

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 95

THE PEOPLE OF PUERTO RICO, PETITIONER,

vs.

RUSSELL & CO., SEN C.

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIRST CIRCUIT**

PETITION FOR CERTIORARI FILED MAY 20, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

**UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.**

OCTOBER TERM, 1939.

No. 3617.

RUSSELL & CO., S. en C.,
DEFENDANT, APPELLANT.

v.

THE PEOPLE OF PUERTO RICO,
PLAINTIFF, APPELLEE.

APPEAL FROM THE SUPREME COURT OF PUERTO RICO,
FROM JUDGMENT, MARCH 15, 1940.

TRANSCRIPT OF RECORD.

FRANCIS E. NEAGLE,
ROUNDS, DILLINGHAM, MEAD & NEAGLE,
WILLIAM CATTRON RIGBY,
for Appellant.
for Appellee.

BOSTON:
PRINTED UNDER DIRECTION OF THE CLERK.

1940

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**UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.**

OCTOBER TERM, 1939.

No. 3617.

**RUSSELL & CO., S. EN C.,
DEFENDANT, APPELLANT,**

v.

**THE PEOPLE OF PUERTO RICO,
PLAINTIFF, APPELLEE.**

TRANSCRIPT OF RECORD.

[Filed in Circuit Court of Appeals August 6, 1890.]

[Filed in the Supreme Court February 8, 1937.]

**IN THE DISTRICT COURT FOR THE JUDICIAL DISTRICT OF
SAN JUAN, PUERTO RICO.**

Civil No. 12,619.

**THE PEOPLE OF PUERTO RICO, represented by MANUEL V.
DOMENECH, Treasurer of Puerto Rico, Plaintiff,**

v.

RUSSELL & Co., SUCRS., S. EN C., Defendant.

RECOVERY OF TAXES.

AMENDED COMPLAINT.

Now comes The People of Puerto Rico, represented by Manuel V. Domenech, in his capacity of Treasurer of Puerto Rico, by the undersigned attorneys, and amending the original complaint filed herein, as its cause of action against the defendant, states and alleges:

I. That The People of Puerto Rico is a sovereign political entity created by an Act of the Congress of the United States of America, approved March 2, 1917, generally known as the Organic Act of Puerto Rico; and that Manuel V. Domenech is the Treasurer of the Insular Government of Puerto Rico, duly appointed and in the discharge of that office according to law.

II. That the defendant Russell & Co., Sucrs., S. en C., is an agricultural civil partnership, organized as a juridical entity in conformity with the Civil Law of Puerto Rico, with power to sue and be sued. On information and belief, which the plaintiff considers true, the aforesaid partnership Russell & Co., Sucrs., S. en C., is composed of the following persons which organized the same with the object of engaging in the cultivation of sugar cane, to wit: Frank A. Dillingham, a citizen of the United States and resident of the State of New Jersey; Horace Havemeyer, a citizen of the United States and resident of the State of New York; Edward S. Paine, a citizen of the United States and resident of the State of New York; Edwin L. Arnold, a citizen of the United States and resident of the State of Florida; Frank M. Welty, a citizen of the United States and resident of the State of Ohio; and H. B. Orde, a citizen of Great Britain, and resident of the Dominion of Canada.

III. The defendant partnership and its predecessor Russell & Co., S. en C., since the year 1921, has been owner of the following rural properties in the Island of Puerto Rico, included in the public irrigation system of the south coast, as will be hereinafter set forth:

1. Property No. 295, in the plan of the irrigation system of the south coast of Puerto Rico, known as Cristina, with an area of 914.90 acres, situated in the ward of Amuelas, of the municipality of Juana Diaz, bounding as follows: On the North, the Jacaguas river and lots Nos. 371-A, 374, 375 and 377, and the main road leading from Ponce to San Juan; on the South lot No. 366-A and the Jacaguas river; lots Nos. 291m 923-C, 296, 359, 364 and 366;

Amended Complaint.

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on the East lots Nos. 294, 296-A, 317-A, 319-A and 323-A; and on the West with the Jacaguas river and lots Nos. 371 and 383.

2. Property known as Luciana, marked No. 379, situated in the wards of Collores, Collado and Jacaguas, of the municipality of Juana Diaz, with a total area of 736.71 cuerdas, and bounding as follows: On the North the Jacaguas river; on the South the Jacaguas river and the main road; on the East the road leading from Villalba to Juana Diaz; and on the West lot No. 380 and the Jacaguas river.

3. Property No. 403, of the aforesaid irrigation plan, known as Fortuna, situated in the ward of Sabana Llana, of the municipality of Juana Diaz, with a total area of 913.44 cuerdas and bounding as follows: On the North lots Nos. 307-A, 335, 336, 334, 338, 339, 340, 391, 392, 402, and 423 and the Jacaguas river; on the South, lots Nos. 403 and 413 and the Jacaguas river; on the West lots Nos. 413, 414, 421 and 423.

4. Property No. 309, known as Serranó, in the municipality of Juana Diaz, with an area of 558.69 acres, and bounding as follows: On the North lots Nos. 308 and 312; on the South the Caribbean Sea; on the East lot No. 308 and on the West lots Nos. 308, 310, 311 and 316.

5. Property or lot No. 413, known as Union.

A certified copy of the plan of the irrigation district of the South coast of the Island, in so far as pertinent, is attached to this amended complaint and made a part thereof.

IV. The properties described in paragraph III of this amended complaint, since the year 1915, have been receiving and still receive water, for irrigation purposes, from the public irrigation system of the South coast of Puerto Rico, by virtue of a contract entered into between their owner, Russell & Co., S. en C., predecessor of the defendant partnership in the ownership of same, and the Commissioner of the Interior of Puerto Rico, the said contract having been executed the 26th of August, 1914, and the same was embodied in public deed No. 20, executed in San Juan, Puerto Rico, on June 8, 1916, before notary Frank Antonsanti.

Plaintiff alleges that all the officers of the Government of Puerto Rico in charge of the execution of said contract, fulfilled the same entirely in accordance with its stipulations, and consequently the properties described in paragraph III of this amended complaint received and are still receiving, the full volume of water stipulated for irrigation purposes, and by reason thereof Russell & Co., Sucrs., S. en C., defendant herein, owner of said properties, and its predecessor, who entered into the aforesaid contract, were benefited thereby.

V. Plaintiff alleges that the properties described were not in the past and are not at present subject to the payment of any irrigation tax under the provisions of an Act of Puerto Rico, approved September 8, 1908, entitled: "An Act to provide for the construction of an irrigation system, and to provide revenues therefor; for the temporary appropriation of two hundred thousand dollars to begin such work, and for other purposes", as subsequently amended.

VI. That the first session of the 10th Legislature of Puerto Rico enacted an Act entitled: "An Act fixing a tax on certain lands using water from the southern coast public irrigation system, on which lands no tax whatsoever was levied under the public irrigation law, and for other purposes", and that said Act was approved by the Governor of Puerto Rico on July 8, 1921, and the same became effective 90 days after its approval. Said Act is No. 49 of 1921; and in accordance with the provisions of same, the lands of the defendant partnership described in paragraph III of this amended complaint were subject thereto, and its owners compelled thereby, to pay the special tax fixed by the above Act No. 49 of 1921.

VII. Plaintiff alleges that in strict conformity with the provisions of said Act No. 49 of 1921, the following amounts were assessed on the lands of the defendant partnership, described in paragraph III, to wit:

Amended Complaint:

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Lot No. 295:

For the years 1922-23 to 1933-34:

Quota	\$6,186.90	
Surcharges	2,402.43	
Total		\$8,589.33

Lot No. 379:

For the years 1922-23 to 1933-34:

Quota	10,519.38	
Surcharges	4,087.75	
Total		\$14,607.13

Lot No. 403:

For the years 1922-23 to 1933-34:

Quota	27,599.38	
Surcharges	10,729.24	
Total		38,328.62

Lot No. 309:

For the years 1922-23 to 1933-34:

Quota	15,891.96	
Surcharges	6,177.13	
Total		22,069.09

Lot No. 403:

For the years 1922-23 to 1933-34:

Quota	3,814.68	
Surcharges	1,482.80	
Total		5,297.48

Lot No. 413:

For the years 1922-23 to 1933-34:

Quota	6,320.46	
Surcharges	2,456.77	
Total		8,777.23

Grand Total:

Total quotas	\$70,332.76
Total Surcharges	27,336.12
Grand Total	\$97,668.88

VIII. Plaintiff alleges that subsequent to the year 1922 the Treasurer of Puerto Rico from time to time has attempted to obtain from the defendant payment of the taxes assessed on said properties in conformity with the provisions of the aforesaid Act No. 49 of 1921, and that in spite of the numerous demands to that end the defendant has refused to pay said tax totally or partially and has hindered the collection of said sum through law suits in the District Court of the United States for the District of Puerto Rico and through other means.

IX. Plaintiff alleges that the total sum owed by the defendant on the aforesaid properties from the years 1922-23 to 1933-34, amounts to \$70,332.76, and that the surcharges owed under said law, amount to \$27,336.12, or a grand total of \$97,668.88, which the defendant owes and has not paid and which the plaintiff, The People of Puerto Rico, is entitled to collect and receive from the defendant, but has not received the same totally or partially.

By virtue whereof, plaintiff prays the court that this amended complaint be sustained and that judgment be rendered in favor of the plaintiff, sentencing the defendant to pay to the Treasurer of Puerto Rico the total sum of \$97,668.88, with interest at the legal rate from the date of filing of the original complaint herein, plus all costs, disbursements and attorneys' fees, caused by this suit, and that the court grant any other remedy which it may deem proper.

San Juan, Puerto Rico, June 8, 1934.

BENJAMIN J. HORTON,

Attorney General,

by M. RODRIGUEZ SERRA,

Assistant Attorney General.

Order.

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Copy served this eighth day of June, 1934.

R. CASTRO FERNANDEZ,

Attorney for the Defendant.

[The same title.]

DEMURRER TO THE AMENDED COMPLAINT.

Now comes the defendant by its undersigned attorneys, and demurs to the amended complaint filed by the plaintiff on June 8, 1934, on the following grounds:

That the amended complaint does not state facts sufficient to constitute a cause of action against the defendant.

Wherefore, defendant prays the court that the complaint be dismissed and plaintiff sentenced to the payment of costs.

San Juan, Puerto Rico, June 18, 1934.

R. CASTRO FERNANDEZ,

Attorney for the Defendant.

Copy served this eighteenth day of June, 1934.

BENJAMIN J. HORTON, *Attorney General,*

by M. RODRIGUEZ SERRA, Assistant Attorney General,

Attorney for the Plaintiff.

[The same title.]

ORDER:

This is an action for the recovery of certain taxes levied on various properties of the defendant, in accordance with Act No. 49 of 1921. It is alleged as a cause of action that the defendant is owner of certain properties described in the amended complaint. That by virtue of the aforesaid act certain taxes were assessed on said properties and that the defendant in spite of the steps taken by the department of finance for the collection of same, has not paid said taxes in toto or partially.

A demurrer for lack of facts to constitute a cause of action was presented to the complaint and in support thereof it is claimed that the amended complaint does not state facts but conclusions of law.

Although we agree with the defendant that certain averments of the amended complaint, such as that referring to the contract entered into between the defendant and The People of Puerto Rico, are immaterial and irrelevant to the cause of action, we can not accept that it is necessary that the plaintiff states in its complaint why the defendant is bound to pay the tax which has given rise to this action. It will suffice to allege that the tax was assessed by virtue of the Act of 1921 and that the defendant has not paid the same. Such an averment on the part of the plaintiff is not a conclusion of law but the statement of an ultimate fact.

As the complaint does not state any reasons why the properties in question should not be subject to the tax giving rise to this suit, that would be a matter of defense to be alleged by the defendant in its answer, if there is in fact some reason why it should not pay the aforesaid tax.

Wherefore, the demurrer to the complaint is overruled, and the defendant is granted a term of ten days to answer.

Let the parties be notified.

Given in San Juan, Puerto Rico, this fourth day of December, 1934.

A. R. DE JESUS, *Judge*.

The parties were notified of the above order, this fifth day of December, 1934.

MANZANO, *Assistant Secretary*.

ANSWER TO THE AMENDED COMPLAINT.

Now comes the defendant by its undersigned attorneys and in answer to the amended complaint filed herein on June 8, 1934, respectfully alleges:

1. It admits the facts averred in paragraph I of the amended complaint.
2. It admits the facts averred in paragraph II of the amended complaint.
3. From the facts averred in paragraph III of the amended complaint the defendant admits being the owner of Cristina

estate, 295; Luciana estate, 379; Fortuna estate, 403, and Serrano estate, 309; but denies that it is or ever was the owner of Union estate, 413, and on the contrary alleges that since the year 1921 it has been lessee of said property No. 413, which is composed of Union and Placeres estates.

4. From the facts averred in paragraph IV of the amended complaint, the defendant admits that the properties described in paragraph III of the amended complaint have received water for irrigation purposes by virtue of a contract entered into with the Commissioner of the Interior of Puerto Rico, on August 26, 1914, embodied in public deed No. 20, executed in this city on July 8, 1916, before notary public Frank Antonsanti, copy of which is attached to this answer as a part thereof, marked "Exhibit A". As regards the other facts averred in said paragraph, the defendant on information and belief denies that all the officers of the Government of Puerto Rico in charge of performing said contract, faithfully discharged the stipulations of same; and denies, furthermore that the described properties received in the past, and are receiving at present, the full volume of water agreed for irrigation purposes; and denies furthermore that the owners thereof, the defendant, and its predecessor, who executed the aforesaid contract, were benefited thereby.

5. It admits the facts averred in paragraph V of the amended complaint.

6. From the facts averred in paragraph VI of the amended complaint the defendant admits that the aforesaid Act No. 49 of 1921 was enacted, but denies that under its provisions the lands of the defendant described in the amended complaint were subject thereto and their owners compelled to pay the special tax fixed thereon.

7. From the facts averred in paragraph VII of the amended complaint the defendant denies that in strict conformity with the provisions of the aforesaid Act No. 49, of 1921, the amounts specified in said paragraph were assessed on the lands of the defendant.

8. From the facts averred in paragraph VIII of the amended complaint, defendant denies having hindered or obstructed the collection of the aforesaid taxes through law suits before the United States District Court for the District of Puerto Rico, or through other means, and on the contrary alleges that in bringing this case before said court all the defendant did was to enforce a vested contractual right and to defend itself from the effects of an entirely unconstitutional and void act, as held by the United States Circuit Court of Appeals for the First Circuit, in this same case, entitled *People of Puerto Rico v. Havemeyer, et al.*, 60 Fed. (2d) 10.

9. From the facts averred in paragraph IX of the amended complaint the defendant denies owing the taxes specified in said paragraph or any amount for such reason, and further denies that the plaintiff is entitled to collect and receive from the defendant any sum of money for such taxes.

FIRST SPECIAL DEFENSE.

10. That the defendant is and has been since the year 1921 in full ownership and has been and is in possession of the four properties known as Fortuna, Cristina, Luciana and Serrano, described in paragraph III of the amended complaint; and that by virtue of certain concessions, royal decrees from the Crown of Spain and their prescriptions, is and has been during all that time, owner of certain water rights existing in favor of said lands, to be used thereon for irrigation purposes, from the Jacaguas, a non-navigable river flowing into the Caribbean Sea; and that the said water rights appurtenant to said lands, are generally described as follows:

a. For parcel known as Fortuna estate, with an approximate area of 312.07 hectares of land, the right to take from the Jacaguas river, for irrigation purposes, 139.75 liters of water per second, equivalent to 3,572.910 acre-feet of water per year, for the aforesaid Fortuna estate.

b. For parcel known as Cristina estate, with an approximate

area of 308.14 hectares of land, the right to take from the Jacaguas river, for irrigation purposes, 106.74 liters of water per second, equivalent to 2,728.969 acre-feet of water per year, for the aforesaid Cristina estate.

c. For parcel known as Luciana estate, with an approximate area of 243.58 hectares of land, the right to take from the Jacaguas river, for irrigation purposes 82.54 liters of water per second, equivalent to 2,111.142 acre-feet of water per year, for the aforesaid Luciana estate.

d. For parcel known as Serrano estate, with an approximate area of 219.15 hectares of land, the right to take from the Jacaguas river, for irrigation purposes, 102.47 liters of water per second, equivalent to 2,619.769 acre-feet of water per year, for the aforesaid Serrano estate.

11. On information and belief defendant avers that the predecessors in interest of the defendant, for over 20 years prior to the 26th of August, 1914, and the defendant and its predecessor in interest, at all times subsequent to the 26th of August, 1914, have been and the defendant is at present, taking and using, whenever it is physically possible to do so, water from the Jacaguas river for the irrigation of said estates, and that by virtue of the aforesaid grants, royal decrees, uses and prescriptions, has taken water up to a total of 11,032.79 acre-feet per year, independent of the torrential water, the aforesaid water having been taken from the river bed through intakes, constructed and established for that purpose by the defendant and its predecessors in interest.

12. On information and belief defendant avers that it is and has been at all times prior to the year 1921, owner, by virtue of certain grants, royal decrees of the Spanish Crown, uses and prescriptions, of the right to take and use for the irrigation of one or more of its aforesaid properties, torrential water of the aforesaid Jacaguas river; and that the predecessors in interest of the defendant, for over twenty years prior to the 26th of August, 1914, have been taking and using for the irrigation of said estates, and the defendant and its predecessors in title at all times, since

August 26, 1914, have been and the defendant is still taking and using for said purpose, torrential water from the bed of the Jacaguas river when the river is at high level, without limit as to the quantity, except as limited by the size and situation of the torrential intake and of the canals carrying the water from the intake to the aforesaid properties, all of this by virtue of the aforesaid concessions, royal decrees, uses and prescriptions and by virtue of the contract attached to this answer, marked "Exhibit A", to which we shall refer hereinafter.

13. That The People of Puerto Rico authorized and constructed a public irrigation system in conformity with the public irrigation act approved September 18, 1908, as amended; and that in the construction of said irrigation system it built a dam to store and deposit part of the water of the Jacaguas river, which dam is known as Guayabal Dam and extends across the bed of the aforesaid Jacaguas river above the intakes that the defendant uses as well as above those used by the defendant and its predecessors in title to take and use water for the irrigation of the aforesaid estates and of Union and Placeres estates mentioned hereinafter.

14. That prior to the 26th of August, 1914, The People of Puerto Rico by its Commissioner of the Interior and in conformity with the provisions of said public irrigation act, with the object of legally storing the water of the Jacaguas river beyond the Guayabal Dam, requested the predecessors in title of the defendant to waive and abandon their rights to take and use water from the Jacaguas river, both the ordinary and the torrential waters, for irrigation purposes, acquired by virtue of the aforesaid concessions, royal decrees, uses and prescriptions in favor of the four parcels of land above described, and that to this proposition they flatly refused.

15. That subsequently thereto The People of Puerto Rico by its Commissioner of the Interior and through its Attorney General entered into dealings with the predecessor in title of the defendant, Fortuna Estates, with the object of determining the time and place in which the amount of ordinary water, not of a torrential

nature, that the said Fortuna Estates was entitled to take for Fortuna, Cristina, Luciana and Serrano Estates, under the rights acquired by it through the aforesaid concessions, royal decrees, uses and prescriptions, should be delivered to it after the construction of the Guayabal Dam was finished; and that as a result of said negotiations the predecessor in title of the defendant, Fortuna Estates, and The People of Puerto Rico, covenanted and agreed that the water of the Jacaguas river, which was not of a torrential nature, and to which said entity was entitled and to which the defendant is entitled to take and use for the aforesaid Fortuna, Cristina, Luciana and Serrano farms, in conformity with the aforesaid concessions, royal decrees, uses and prescriptions, amounting to 11,032.79 acre-feet per year, would thenceforth be taken and used by it in regular daily quantities amounting to 8,258.90 acre-feet per year, through several of the intakes situated within its properties, and that the balance of 2,773.81 acre-feet per year, that is 3.86 feet per second, would be taken by it at the Aruz Pump or at the intake of said river, from any water of said river that might not be necessary for furnishing it to the owners of the lower concessions existing prior to the 26th of August, 1914, with the amount of water that they might be entitled by virtue of said concessions or through covenants with The People of Puerto Rico.

16. That in accordance with said covenant, Fortuna Estates and The People of Puerto Rico executed on the 26th of August, 1914, a contract comprising everything agreed between them, as alleged in the foregoing paragraph, and that on June 8, 1915, the said contract was embodied in a public deed, copy of which is attached to this answer as Exhibit A. The defendant alleges that in the said contract the aforesaid water rights of Fortuna Estates for the irrigation of said farms were acknowledged by The People of Puerto Rico and that the same continued in full force and effect, and were in no wise or form waived or abandoned, the manner of receiving the water being solely modified temporarily, though not the right to receive said water or the amount thereof, which re-

mained unchanged. The defendant alleges moreover that in carrying out the aforesaid negotiations and in executing the aforesaid contract, the Commissioner of the Interior acted within the authority granted to him by the Legislature in approving an act of August 8, 1913, which act acknowledged furthermore the property rights of the holders of Spanish grants, among which is found the predecessor in title of the defendant, Fortuna Estates.

17. That subsequently thereto Fortuna Estates sold, ceded and transferred to the defendant the four parcels of land or estates above described, with their rights, uses and privileges in the concessions, royal decrees, uses and prescriptions aforementioned, and with all the rights, titles and interest in the aforesaid contract marked "Exhibit A", as well as to the waters to which it was entitled thereunder.

18. On information and belief the defendant alleges that Jose A. Poventud, Sergio Torruella Cortada and heirs of J. Serralles, are, and that they and their predecessors in title, were at all times prior to the year 1921, absolute owners of two parcels of land situated in the municipality of Juana Diaz, Puerto Rico, known as Union and Placeres estates, described in paragraph III of the amended complaint, as property No. 413, and through their lessee the defendant herein, is and was at all times prior to the year 1921, in the physical possession of same and that they are and have been during all that time, by virtue of the concessions, royal decrees of the Spanish Crown, uses and prescriptions, the owners of certain water rights in favor of said lands to be used thereon for irrigation purposes, from the said Jacaguas river; and that the aforesaid lands and water rights appurtenant thereto are described generally as follows:

a. Parcel known as Union estate, with an approximate area of 150.14 hectares of land, entitled to take from the Jacaguas river, for the irrigation of same, 39.60 liters of water per second, equivalent to 1,013.56 acre-feet of water per year, for said Union estate.

b. Parcel known as Placeres estate, with an approximate area of 240.54 hectares of land, entitled to take from the Jacaguas river,

for the irrigation of same, 22 liters of water per second, equivalent to 563.75 acre-feet of water per year, for said Placeres estate.

19. That subsequently thereto, but prior to 1921, the owners of said two parcels of land leased the same for a number of years to the predecessors in title of the defendant and as incidental to said lease, transferred to the predecessor in title of the defendant all the rights that, through concessions, royal decrees, uses and prescriptions, or contract, they had to take water for the irrigation of said lands, and that in accordance with said lease the lessee is bound to pay any tax that may be assessed on said lands.

20. On information and belief the defendant alleges that the owners of the aforesaid two parcels, their predecessors in interest and the predecessors in interest of the defendant, as lessees, have been for over 20 years prior to the 26th of August, 1914, taking and using, and the defendant and its predecessor in title, as lessees, have been at all times, subsequent to the 26th of August, 1914, and the defendant is at present, taking and using, whenever that is physically possible, water from the Jacaguas river for the irrigation of said estates, by virtue and in accordance with the aforesaid concessions, royal decrees, uses and prescriptions.

21. On information and belief, that the aforesaid Jose A. Poyentud, Sergio Torruella Cortada and heirs of J. Serralles, are owners moreover, by virtue of certain concessions, royal decrees of the Crown of Spain, uses and prescriptions, of the right to take and use torrential water from the Jacaguas river for the irrigation of said Union and Placeres farms, and their predecessors in title through the defendant and the predecessors in title of the latter, as lessees, for over 20 years prior to the 26th of August, 1914, have been taking and using for the irrigation of said estates, and the defendant, is taking and using for said purpose, torrential water from the bed of the Jacaguas river, when the river is at high level, without limitation as to quantity, except as limited by the size and situation of the torrential intakes and of the canals that carry the water from the intake to the aforesaid properties, all of this in accordance and by virtue of the aforesaid concessions,

royal decrees, uses and prescriptions and in conformity with the contract attached to this answer, marked "Exhibit A", to which we shall refer hereinafter.

22. That prior to the 26th of August, 1914, The People of Puerto Rico through its Commissioner of the Interior and in accordance with the provisions of the public irrigation act and in order to legally attempt to dam the water of the Jacaguas river beyond the Guayabal Dam, requested from the predecessors in title of the aforesaid Jose A. Poventud; Sergio Torruella and heirs of J. Serrallés, and from the predecessors in title of the defendant, to waive and abandon their right to take and use from the Jacaguas river, both ordinary and torrential waters for irrigation purposes, acquired by virtue of the aforesaid concessions, royal decrees, uses and prescriptions in favor of the two parcels above described known as Union and Placeres, to all of which they flatly refused.

23. That subsequently to the facts averred in the preceding paragraphs, The People of Puerto Rico, through its Commissioner of the Interior and through its Attorney General, entered into negotiations with the owners at the time of the aforesaid two parcels, Jose A. Poventud, Isabel Cortada, widow of Poventud, Juan Torruella Cortada and Sergio Torruella Cortada, predecessors in title of the present owners, and with Fortuna estates, predecessor in title of the defendant, as lessee, with the object of determining the time and places from where the amount of water, besides the torrential water, which they were entitled to take for Union and Placeres estates in accordance with the rights acquired by them under the aforesaid concessions, royal decrees, uses and prescriptions, should be delivered to them once the construction of the Guayabal Dam was finished; and that as a result of said negotiations the said persons and The People of Puerto Rico covenanted and agreed that the waters of the Jacaguas river, which were not of a torrential nature, that said co-owners were entitled to take for the irrigation of said Union and Placeres estates, under the aforesaid concessions, royal decrees, uses and prescriptions, amounting to 1,579.31 acre-feet of water per year, be thenceforth

taken and used by them in regular daily quantities amounting to 946.55 acre-feet per year in several of the intakes situated within their properties.

24. That in accordance with said covenant, the aforesaid co-owners on the 26th of August, 1914, executed a contract with The People of Puerto Rico, comprising everything that had been covenanted between them as alleged in the preceding paragraph, copy of which is attached to this answer as Exhibit B and as a part thereof. The defendant alleges furthermore that in the said contract the water rights of the aforesaid Jose A. Poventud, Isabel Cortada, widow of Poventud, Juan Torruella Cortada, and Sergio Torruella Cortada, as well as those of its lessee Fortuna Estates, were acknowledged by The People of Puerto Rico, continued in full force and effect and were in no wise or manner waived or abandoned by them, the same having been solely modified temporarily, as to the manner of receiving the water, but not as to the right to receive the same nor as to the quantity of same, these rights remaining unchanged. The defendant alleges furthermore that the Commissioner of the Interior in carrying out the aforesaid negotiations and in executing the said contract, acted in accordance with the authority granted to him by the Legislature of Puerto Rico in approving Act of August 8, 1913, which acknowledges furthermore the property rights of the holders of Spanish concessions, among which is found the above-mentioned co-owners as predecessors in title of the present owners and of Fortuna Estates, predecessor in title of the defendant.

25. That subsequently thereto, while Fortuna Estates was lessee of the aforesaid Union and Placeres properties including all the water rights enjoyed by said properties or by the owners thereof, it sold, assigned and transferred to the defendant, the lease it had on said properties including all the rights, benefits and privileges acquired by virtue of the aforesaid concessions and contract.

26. That subsequently thereto and in conformity with a judgment rendered on July 16, 1918, by the District Court of the United States for the District of Puerto Rico, in equity case No.

970, entitled "Russell & Co. Succrs., plaintiff, v. Emilio V. Henna, et al., defendants, and The People of Puerto Rico, intervener", affirmed by the Circuit Court of Appeals for the First Circuit (*People v. Russell & Co.*, 268 Fed. 723), the water rights of the defendant under the aforesaid contract of August 26, 1914, in favor of Fortuna, Cristina, Luciana and Serrano estates, was declared valid and existing and a permanent injunction was issued against The People of Puerto Rico, its agents and employees, restraining them from deviating and obstructing the waters of the Jacaguas river, in excess of those necessary to cover the concessions existing on said river prior to August 26, 1914; and the defendant alleges that there has been no change in the rights of the defendant over said properties from the date of said judgment to the present.

27. That the right of the aforesaid Jose A. Poventud, Sergio Torruella Cortada and heirs of J. Serralles, and those of the defendant, as lessee, to take water under the contract of August 26, 1914, for Union and Placeres estates, is and has always been in every respect similar to the right of the defendant to take water under the aforesaid contract of August 26, 1914, in favor of Fortuna, Cristina, Luciana and Serrano estates.

28. That neither the defendant nor the aforesaid estates, have received or are receiving or have been or are being supplied with water for the irrigation of said properties from the public irrigation system of the southern coast, with the exception of those waters which the defendant and the aforesaid estates were and are entitled to receive, under and by virtue of the aforesaid concessions, royal decrees of the Spanish Crown, uses and prescriptions and under and by virtue of the aforesaid contracts of August 26, 1914.

29. That Act No. 49 of 1921, approved July 8, 1921, entitled "An Act fixing a tax on certain lands using water from the southern coast public irrigation system, on which lands no tax whatsoever was levied under the public irrigation law, and for other purposes", under which the plaintiff claims to be entitled to

assess the taxes and surcharges claimed herein, in so far as it attempts to assess and levy a tax on the aforementioned lands, is unlawful, unconstitutional and void and has no legal force or effect, for the following reasons:

(a) Because the aforesaid Act No. 49, of 1921, impairs the obligations contracted under the aforesaid contracts of August 26, 1916 (Exhibits A and B), which contracts are valid and were in full force and effect at the time said act was approved; all of this in violation of the provisions of the United States Constitution and of Section 2 of our Organic Act, which provides that: "no law impairing the obligation of contracts shall be enacted".

(b) Because said Act No. 49, of 1921, infringes the provisions of the United States Constitution and of our Organic Act, inasmuch as it delegates legislative powers to the Commissioner of the Interior.

(c) Because said Act No. 49 of 1921 violates the provisions of the United States Constitution, and our Organic Act, because it attempts to levy a special tax on certain lands without the corresponding benefit to said lands or their owners, thus depriving the defendant of its property without due process of law.

(d) Because the aforesaid Act No. 49 of 1921, violates the provisions of the United States Constitution and our Organic Act, inasmuch as it attempts to condemn property rights of the defendant, to wit: the aforesaid water rights corresponding and forming part of the above-mentioned parcels of the defendant, thus depriving the latter of its property without due process of law and condemning private property for public purposes without due compensation.

(e) Because the aforesaid Act No. 49 of 1921 violates the provisions of the United States Constitution and of our Organic Act, inasmuch as it attempts to condemn property rights of the defendant, to wit: the aforesaid water rights, acquired by the defendant by virtue of the aforesaid contract of August 26, 1914, thus depriving the defendant of its property without due process of law

and condemning its private property for public purposes without just compensation.

(f) Because the aforesaid Act No. 49 of 1921 violates our Organic Act, inasmuch as it attempts to levy a tax on property of the defendant only and not over other properties in the Island of Puerto Rico, thus infringing the rule of uniformity contained in our Organic Act.

(g) Because the aforesaid Act No. 49 of 1921 violates the Treaty of 1898 with Spain, known as the Treaty of Peace, inasmuch as it impairs and destroys property rights of the defendant granted by the Spanish government which rights were valid and existent at the time of executing and promulgating the aforesaid treaty.

(h) Because the aforesaid Act No. 49 of 1921 violates our Organic Act inasmuch as it attempts to levy said tax on a limited class of land, arbitrarily selected and without receiving any benefit therefrom, thus violating the provisions of our Organic Act which guarantees the equal protection of the laws.

(i) Because the aforesaid Act No. 49 of 1921 violates the provisions of the United States Constitution and of our Organic Act inasmuch as it provides the manner in which the tax shall be determined and fixed, and containing no provision with regard to notice or opportunity to the defendant and to other landowners to be heard in connection with same or any provisions granting the right of appeal or review, thus depriving the defendant of its property without due process of law.

AS SECOND SPECIAL DEFENSE.

50. That on June 12, 1926, in accordance with a final decree entered by the District Court of the United States for Puerto Rico, dated June 11, 1926, in equity case No. 1250, entitled "Horace Havemeyer, et al. v. Juan G. Gallardo", this defendant obtained, after the corresponding trial on the merits of the case, a permanent injunction restraining the defendant therein from levying or collecting from the defendant herein or over the lands of the defendant above described, any tax authorized by Act No. 49 of 1921,

approved July 8, 1921; that said case was appealed to the United States Circuit Court for the First Circuit, and said appeal was pending before said court on March 4, 1927, when the Congress of the United States approved an amendment to Section 48 of our Organic Act, prohibiting the issuance of injunctions to restrain the assessment or collection of taxes.

31. That the Congress of the United States on April 23, 1928, approved Act No. 302, which provides substantially that the Treasurer of Puerto Rico shall enforce the assessment and collection of any tax whose collection has been restrained by an injunction decreed by the District Court of the United States for the District of Puerto Rico; through the corresponding trial instead of through attachment, garnishment or restraint proceedings, or through any other summary administrative proceeding, at any time within the year following the approval of said act, that is on or before April 23, 1929.

32. That although the present case was brought by the plaintiff, The People of Puerto Rico, in accordance with the authority conferred thereto by the Congress of the United States, in said Act No. 302, of April 23, 1928, the original complaint was not brought until June 24, 1930, that is two years and two months after the approval of said Act No. 302, of April 23, 1928, for which reason, in accordance with said act, any right which the plaintiff might have to collect said tax has prescribed as well as the cause of action.

Wherefore, the defendant respectfully prays this Honorable Court, that in due course the complaint be overruled, and plaintiff sentenced to the payment of costs.

San Juan, Puerto Rico, April 1, 1935.

R. CASTRO FERNANDEZ,

Attorney for the Defendant.

R. Castro Fernandez, being duly sworn, deposes and says:

That he is the attorney for the defendant; that he has drawn and read the preceding answer and that the facts therein averred

are true and are known to him on information which he considers true; that the reason why this answer is not verified by the defendant is that the latter is a civil partnership and all its partners reside and are at present out of the Island of Puerto Rico, and the deponent is authorized to verify the same.

R. CASTRO FERNANDEZ.

Affidavit No. 53.

Sworn to and subscribed before me by R. Castro Fernandez, of full age, married, attorney at law and resident of this city, to me personally known this first day of April, 1935.

JOSE LOPEZ BARALT,

Notary Public.

Copy served this day of April, 1935.

BENJAMIN J. HORTON,

Attorney General,

by M. RODRIGUEZ SERRA,

Assistant Attorney General,

Attorney for the Plaintiff.

EXHIBIT A.

IRRIGATION CONTRACT.

Number Twenty

In the City of San Juan, Island of Porto Rico on this eighth day of June, A.D. nineteen hundred fifteen before me, Frank Anton-santi, attorney at law and notary public, with office in the Royal Bank Building, San Juan, Porto Rico, and duly licensed to practice throughout the Island, personally appeared: Manuel V. Domenech, who is of age, married, a resident of this city, by profession a civil engineer, and at the present time Commissioner of the Interior of Porto Rico, which function he has been discharging since the twenty-ninth day of October, A.D. nineteen hundred fourteen, as party of the first part, and Julius Umbach, who is of lawful age, married, a merchant and a resident of the City of Ponce, as party of the second part.

The party of the first part appears in his official capacity of Commissioner of the Interior of Porto Rico, and in representation and on behalf of The People of Porto Rico, and the party of the second part does so as attorney in fact and on behalf of the Fortuna Estates, which is a corporation organized under the laws of the State of New York, having its principal office in Porto Rico in the City of Ponce.

I, the notary, hereby certify as to being personally acquainted with the appearing parties they assuring me that they are in the full enjoyment of their civil rights, which fact as well as the respective representations of the said parties is personally known to me.

The said appearing parties thereupon freely state:

That on the twenty-sixth day of August, A.D. nineteen hundred fourteen, a certain private contract was entered into by and between Ernest S. Wheeler, as Assistant Commissioner of the Interior of Porto Rico, at the time acting as Commissioner of the Interior in representation and on behalf of The People of Porto Rico, as party of the first part, and the Fortuna Estates, represented by its attorney in fact Julius Umbach, as party of the second part, and which contract is fully transcribed hereinafter.

That by virtue of the said private contract hereinbefore referred to and which was acknowledged before F. Manuel Toro and Damian Monserrat, notaries public, on the twenty-sixth and twenty-eighth of August, nineteen hundred fourteen, and as specially provided by clause sixteenth thereof, it was agreed by the parties thereto that a public document should be drawn embodying the said private agreement, at the request of either of the parties to said contract, and, the parties thereto and hereto having mutually expressed their desire at this time to embody the said private agreement in a public document, for carrying into effect their desire, they hereby state:

That the private agreement as entered into by and between the parties thereto is as follows, to wit:

Fortuna Estates Contract

Memorandum of Agreement made this twenty-sixth day of August, 1914, between Ernest S. Wheeler, Assistant Commissioner of the Interior, discharging since January 17, 1914, the duties and functions of Commissioner of the Interior of Porto Rico, now in the discharge of such duties and functions and in possession of said office and acting as such Commissioner of the Interior of Porto Rico, in representation and on behalf of The People of Porto Rico, party of the first part, and the Fortuna Estates, a New York corporation, party of the second part.

Whereas, Fortuna Estates is the owner in fee simple of four (4) tracts of land situated in the Municipality of Juana Diaz, in the district of Ponce, in the Island of Porto Rico, and claims as appurtenant thereto, by virtue of certain concessions, royal decrees of the Kingdom of Spain and user, the right to use thereon waters from the River Jacaguas for the irrigation thereof, the said lands and water rights being generally described as follows:

1. One tract known as the Estate "Fortuna", comprising approximately 312.07 hectares of land, with an appurtenant right to take from the River Jacaguas, for the irrigation thereof, 139.75 liters of water per second, equivalent to 3,572.910 acre feet of water per year, for said estate "Fortuna".

2. One tract known as the Estate "Cristina" comprising approximately 308.14 hectares of land, with an appurtenant right to take from the River Jacaguas, for the irrigation thereof, 106.74 liters of water per second, equivalent to 2,728.969 acre feet of water per year for said Estate "Cristina".

3. One tract known as the Estate "Luciana", comprising approximately 243.58 hectares of land, with an appurtenant right to take from the River Jacaguas, for the irrigation thereof, 82.51 liters of water per second, equivalent to 2,111.142 acre feet of water per year for said Estate "Luciana".

4. One tract known as the Estate "Serrano", comprising approximately 219.15 hectares of land, with an appurtenant right to

take from the River Jacaguas, for the irrigation thereof, 102.47 liters of water per second, equivalent to 2,619,769 acre feet of water per year for said Estate "Serrano".

And whereas, Fortuna Estates and its predecessors in title have been for upwards of twenty years and are now taking waters from the River Jacaguas for irrigation of said tracts of land, and claims to have been doing so under and by virtue of the said concessions and the said royal decrees of the Kingdom of Spain, granting, approving and confirming the water rights aforesaid (a list of said concessions and decrees being hereto annexed and marked "Schedule A"), such waters having been taken from the bed of said River Jacaguas through intakes built and established for the purpose by the predecessors in title of the Fortuna Estates, and

Whereas, Fortuna Estates also claims the right to take for the irrigation of the said four (4) tracts of land hereinabove mentioned torrential waters from the bed of the Jacaguas River during the time of high water without limit as to quantity except as limited by the size and the location of the intakes and the canals leading therefrom to the respective tracts of land aforesaid (a list of the concessions therefor being hereto annexed and marked "Schedule B"), and that said rights for the taking and use of such torrential waters have been exercised by the Fortuna Estates and its predecessors in title for upwards of twenty years, and are now so exercised; and

Whereas, The People of Puerto Rico has authorized and undertaken the construction of a public irrigation system, in accordance with the Public Irrigation Law approved September 18, 1908, and the amendments thereto, and has recently, in the construction of the said irrigation system, erected a dam (known as the Guayabal Dam), across the bed of the said Jacaguas River above the said intakes which the said Fortuna Estates uses for taking water for irrigating its said four tracts of land in accordance with its said claim of right and The People of Porto Rico proposes to use the said dam for the impounding and storage of a part of the waters

of the River Jacaguas and of the River Toro Negro, a stream rising on the North side of the main watershed of the Island of Porto Rico, whereby the source of supply of the waters which the Fortuna Estates claims to be entitled to by reason of the aforesaid concession, royal decrees and user for the irrigation of the four tracts of land aforesaid, may be interrupted and impaired; and

Whereas, said water rights and concessions have not been relinquished or surrendered to The People of Porto Rico and said Fortuna Estates is unwilling to enter into any agreement or arrangement for the relinquishment or surrender of the said water right and concessions; and

Whereas, the amount of water taken by the Fortuna estates and its predecessors in title for the irrigation of said four tracts of land under its said claims of water rights varies from month to month in accordance with the rainfall in the watershed of the said Jacaguas river, so that it is impossible to determine in advance the exact amount of water to which the Fortuna Estates is entitled under the said claimed water rights for any fixed period of time, and The People of Porto Rico (notwithstanding the construction and operation of said Guayabal Dam), is ready to deliver from the said Jacaguas river to the said Fortuna Estates the amount of water to which the latter may be entitled under its said concessions, but, in order to facilitate and make more certain the operation of the said dam and the irrigation system of which it is a part, desires to determine and agree upon an amount of water which, delivered regularly, may, under all attending circumstances, be considered to be fair equivalent in value for irrigation purposes of the amount of water which the Fortuna Estates would under ordinary circumstances take and use under the said water rights and concessions; and

Whereas, the Commissioner of the Interior is authorized and empowered, by Section 13 of the amendment to the Public Irrigation Law, approved August 8, 1913, after consulting with the Attorney General of Porto Rico as to the validity and legal status of the said water rights or concessions, to enter, on behalf of The

People of Porto Rico, into agreement with the owner of the said water rights or concessions upon an amount of water equivalent to the water taken and used under said water rights and concessions and as to the time, place and conditions of delivery thereof to the lands to which the said water rights or concessions are appurtenant; and

Whereas, The Attorney General of Porto Rico has been consulted, as provided by said Act;

Now, therefore, in consideration of the premises and of the covenants and agreements on the part of each party hereinafter contained, said Acting Commissioner of the Interior in representation and on behalf of The People of Porto Rico, party of the first part, and said Fortuna Estates, do hereby covenant and agree as follows:

First. The parties hereto hereby agree that the quantities of water specified in this paragraph, delivered uniformly through the year, subject to the terms and conditions specified in this agreement, together with the additional water the right to take which is provided for or reserved in paragraphs Third and Fourth hereof, are the fair equivalent in value of the water which the said Fortuna Estates takes under and pursuant to the concessions and water rights claimed by it, and The People of Porto Rico will, subject to the conditions and limitation hereinafter specified and at the times, places and subject to the conditions of delivery hereinafter provided for, make delivery to the Fortuna Estates, for the irrigation of the said tracts of land hereinabove referred to, of the said amounts of water, to wit:

For the Estate Fortuna, 3,306.45 acre feet per year;

For the Estate Cristina, 1,312.48 acre feet per year;

For the Estate Luciana, 1,260.22 acre feet per year;

For the Estate Serrano, 2,379.83 acre feet per year;

The waters so to be delivered shall be delivered, subject to the conditions hereinbelow expressed, in substantially equal quantities from day to day, to wit:

For the Estate Fortuna, 9.06 acre feet daily;
For the Estate Cristina, 3.59 acre feet daily;
For the Estate Luciana, 3.45 acre feet daily;
For the Estate Serrano, 6.52 acre feet daily;

Second. The People of Porto Rico will deliver the said water as follows:

(a) The water deliverable hereunder for the Estate Fortuna, at the intake provided by Fortuna Estate for a reservoir, established on the Estate Cristina

(b) The water deliverable hereunder, for the Estate Cristina, as follows:

741.21 acre feet per annum at the intake provided by Fortuna Estates for a reservoir established on the Estate Cristina, and

571.27 acre feet per annum in the bed of the river to be taken by pump at a pumping station heretofore established by the Fortuna Estates near the right bank of the said Jacaguas river, known as the Aruz Pumping Station.

(c) The water deliverable hereunder for the Estate Serrano, at the present low-water intake of that Estate on the Jacaguas river.

Except in the cases of shortage of water in the reservoir behind the Guayabal Dam hereinafter provided for, the presence of water in the river bed at the intakes of the Aruz pumping station and the Serrano Canal, respectively, in quantities sufficient to permit the taking at the said intakes of the amounts of water specified shall be deemed to be deliveries in accordance with the last two provisions.

The People of Porto Rico, however, reserves the right, upon giving twenty-four hours notice to the manager or other person in authority of the Estate Serrano to deliver such water at the intakes established by Fortuna Estates for the reservoir upon the Estate Cristina.

(d) The water deliverable hereunder for the Estate Luciana, at the intake provided by Fortuna Estates for a reservoir established on the Estate Luciana.

Third. Fortuna Estates is hereby granted the right while this agreement remains in force to take in addition to all amounts of water above specified, from the Jacaguas river by pump at the said Aruz Pumping Station, water which may be available there for irrigation of any of its said lands, to the extent that such taking shall not deprive any owners or users of subsisting water rights or concessions upon the Jacaguas river of the water to which such owners or users may be entitled, either by virtue of such water rights or concessions or by virtue of any agreement or agreements in regard thereto entered into or to be entered into by them with The People of Porto Rico; Provided, however, that should The People of Porto Rico at any time undertake the development and utilization of the surplus waters of this part of the Jacaguas river, this right shall be understood to be limited to a maximum usage of 3.86 second feet.

The Fortuna Estates shall maintain at the said Aruz Pumping Station an accurate and appropriate measuring device for the measurement of the water taken from the river at such station, which shall at reasonable time be subject to inspection by the properly accredited employees of the Irrigation Service.

Fourth: In addition to the amounts of water hereinbefore set forth, the Fortuna Estates hereby reserves and shall have the right to take torrential waters from the Jacaguas River through its head-gates at present existing for the use of torrential waters. Such head-gates, wherever they do not conform to the terms of the concession, shall be reconstructed in conformity therewith, and such use of torrential waters shall be subject to such priorities in the use of torrential waters as may exist in the said Jacaguas River. The foregoing provision, however, shall not in any way limit The People of Porto Rico from restraining all of the torrential flood waters which it may desire and which it may be legally entitled to restrain in the reservoir above the Guayabal Dam.

To the extent that there may be waters derived through underground filtration or seepage from the River Jacaguas or its tribu-

taries or from the reservoir maintained behind the said Guayabal Dam, which rise to or near the surface of the ground within the boundary lines of any so-called "poyal" or "semi-poyal" portions of any of the tracts of land owned, leased, operated or cultivated by the Fortuna Estates, its successors or assigns, or any waters so derived in wells made or to be made upon any portions of said lands or any of them, which are not strictly subterranean waters, within the meaning of that term as used in the Laws of Porto Rico, and the full property of the owner or possessor of said lands, the said Fortuna Estates, its successors, lessees and assigns, while this agreement remains in force, may make use of the said waters and all portions thereof in such manner and for such purposes as it or they shall from time to time elect without payment or responsibility to The People of Porto Rico for or in respect thereto, except in so far as such right and the means adopted or to be adopted for its exercise may be limited, modified or restricted by the provisions of the Laws of Waters.

Fifth: During ten days in each year, while the agreement is in force, The People of Porto Rico shall deliver to said Fortuna Estates, and the latter may take and use, at its present intakes in the Jacaguas River (as indicated upon the annexed chart furnished by Fortuna Estates marked "Schedule C") built and used for said respective tracts of land, in lieu of all quantities of water elsewhere specified in this agreement except in Section "Fourth" the amount of water which said Estates claims to be entitled to take for each of said four tracts of land under the said concessions and water rights, to wit:

For the Estate Fortuna, 139.75 liters of water per second;

For the Estate Cristina, 106.74 liters of water per second;

For the Estate Luciana, 82.54 liters of water per second;

For the Estate Serrano, 102.47 liters of water per second;

The presence of water in the river bed of the Jacaguas River, at the openings of the said intakes, in quantities sufficient to permit the taking by the Fortuna Estates of the quantities of water speci-

fied in this paragraph, shall be deemed a delivery in accordance with this paragraph on behalf of The People of Porto Rico.

Forty-eight hours' notice shall be given, by or on behalf of the Irrigation Service, to the manager of or other person in authority upon the Fortuna Estates, of the proposed delivery of water to the Fortuna Estates in accordance with the terms of this section instead of in accordance with the other terms of this agreement.

Sixth. Whenever and as long as there is no storage water in the reservoir behind said Guayabal Dam, The People of Porto Rico shall deliver, subject to the terms of this agreement, to the Fortuna Estates the quantities of water herein provided for from the flow of the Jacaguas River exclusive of water added thereto from the Toro Negro River; but such delivery shall be subject to be cut off or diminished when and so long as and to the extent that such flow is insufficient to supply all water deliverable to the owners or users of subsisting valid water rights or concessions having priorities for the use of the waters of the Jacaguas River (whether by virtue of such rights or concessions, or by virtue of agreement with regard thereto entered into between such owners or users and the Commissioner of the Interior or any other person or body authorized by law to enter into such agreements in representation of The People of Porto Rico) in accordance with the "Order of Suspension" established in the Definitive Table of Distribution of the Waters of the River Jacaguas, approved by Royal Decree of June 8, 1880, a copy of which is hereto annexed marked Schedule D.

The People of Porto Rico shall have the right to divert from the reservoir behind the Guayabal dam into the Juana Diaz Canal, or any other canals of the Irrigation System, the amount of water flowing into the reservoir from the Toro Negro River or from any other sources than the Jacaguas River, whether or not there is any storage water in the Guayabal Reservoir; and it is further understood and agreed by and between the parties that, as far as the Fortuna Estates is concerned, The People of Porto Rico may divert all the waters of the Jacaguas River, after providing for the de-

livery to the Fortuna Estates of the waters to which it is entitled, as specified in this agreement, into the Juana Díaz Canal or any other canals, ditches or reservoirs of the Irrigation System.

It is understood and agreed that the expression "storage water" does not include water in the said reservoir not rising to a height more than three feet above the bottom of the outlet gates to the Juana Diaz Canal.

Seventh. In the event that, for any cause, whether within or beyond the control of The People of Porto Rico (except in the case hereinbefore provided for), the delivery of water to the Fortuna Estates at any point shall be temporarily, partly or wholly interrupted, The People of Porto Rico shall, during the continuance of such cause, deliver an equivalent amount of water to the Fortuna Estates at some other point in the irrigation canals of Fortuna Estates to be selected by the Irrigation Service.

Eighth. In the event that the Fortuna Estates, its successors or assigns, shall at any time determine that it is to its or their best interest to discontinue the use of the storage reservoir constructed upon the Estates Cristina and Luciana, the waters to be delivered into such reservoirs, as hereinabove agreed, shall be delivered either into the present intakes in the Jacaguas River appurtenant to the lands in question or at such other point or points upon or adjacent to said lands as the Fortuna Estates, its successors, or assigns, shall determine: Provided, however, that such delivery at places other than said present intakes shall be made without loss of water to The People of Porto Rico, and that all extra expenses occasioned by such delivery shall be borne by the Fortuna Estates, its successors or assigns.

Ninth. The People of Porto Rico consents that, to the extent that the owners or users of valid and subsisting water rights may not be prejudiced, the Fortuna Estates may apply the water deliverable hereunder or any part of it to the irrigation of any of the lands hereinbefore described or any parts or portions thereof.

Tenth: It is further specifically understood and agreed by and between the parties hereto that any temporary or other arrange-

ment or agreement made between the said Fortuna Estates, its successors, lessees or assigns, or any official or representative thereof and any official of the Government of Porto Rico with respect to the taking and use of waters from the River Jacaguas, the measurement of such waters, the building of reservoirs, canals, siphons and pipe lines, the diversion of waters from one tract of land to another, the time during which waters shall be delivered from time to time, the amount of water to be delivered at any point or points at any time or times the purchase of surplus water from time to time, or any other matters connected with the use of the said waters of the Jacaguas River, and the irrigation therewith of the lands owned, leased and cultivated by the Fortuna Estates, its successors or assigns, shall at all times and for all purposes be deemed to be subject to the terms and provisions of this agreement, and shall not affect or modify the same or be deemed or considered so to do or to affect or prejudice the rights of either party hereunder.

Eleventh: It is agreed by both parties that the delivery to and the use by the Fortuna Estates of water in accordance with the terms and conditions expressed in this agreement shall not in any event affect or modify the present existing status of the water rights and concessions claimed by the said Fortuna Estates; but that such delivery and use is to be made in view of the modified physical conditions resulting in the bed of the River Jacaguas from the establishment of the public irrigation service, which on the one hand henceforth permit the delivery to and the use by the Fortuna Estates of a substantially uniform flow of water, as provided in this agreement, and on the other modifies to some extent the use of the water heretofore made by the Fortuna Estates; that such delivery and use shall continue as long as such modified conditions continue to exist, and in the event of the total or partial destruction of the Guayabal Dam, or of the main canal known as the Juana Diaz Canal, connected therewith, from any cause whatsoever, and the resulting inability of The People of Porto Rico to comply with the terms of this agreement, the Fortuna

Estates may forthwith exercise such rights as it has under the said concessions and grants, but as soon as The People of Puerto Rico shall have reestablished or reconstructed the works so destroyed in substantially the same form as at present constructed, or in such a manner as to enable it to perform substantially the terms of this agreement, this agreement shall be revived and in full force and effect from such time.

Twelfth. Neither the execution of this agreement by the Fortuna Estates nor the acceptance and use of water delivered to it as herein provided, nor any consent, waiver or permission given or held to be given hereby or hereunder, nor any failure on the part of the Fortuna Estates, acting in accordance with this agreement to take and use water in accordance with the exact terms of its said concessions and water rights, or any of them, nor anything done or suffered by said Fortuna Estates hereunder or in accordance with the terms hereof or pursuant to the provisions herein contained, shall at any time or for any purpose be deemed to affect, modify or change to any extent the status of the said water rights and concessions claimed by the Fortuna Estates as existing at the time this agreement was entered into, or to limit or prejudice any rights or privileges which the Fortuna Estates, ~~its successors~~ or assigns, may have under or by virtue of the said concessions, and the grants and decrees respecting the same hereinabove described, or by virtue of the use of the said water of said Jacaguas River, heretofore made by it and its predecessors in title.

Thirteenth. In the event of the permanent abandonment by The People of Porto Rico of said irrigation system utilizing the waters of the Jacaguas River, or in the event that The People of Porto Rico or the Official or Official Body in charge of the irrigation service shall be enjoined or restrained by final order or decree of any court of competent jurisdiction from carrying out the provisions of this agreement, then this agreement shall become null and of no force and the Fortuna Estates shall be entitled to the exercise of any and all rights which it had at the time this agree-

ment was entered into as if this agreement had never been entered into or performed in whole or in part by either party hereto; and in the event that The People of Puerto Rico or the Official or Official Body in charge of the irrigation service shall, without reasonable cause, fail or refuse to deliver water to the Fortuna Estates, its successors or assigns, substantially as herein agreed, then and in any such event, and for so long as said failure or refusal shall continue, the Fortuna Estates shall be entitled to the exercise of any and all the rights which it had at the time this agreement was entered into as if this agreement had never been entered into or performed in whole or in part by either party hereto.

Fourteenth. Nothing in this agreement contained shall be taken to impair or abridge such right as The People of Porto Rico may have to modify, enlarge or improve any of the works or structures of the Irrigation System, or to add other works or structure thereto.

Fifteenth. This agreement shall apply to, benefit and bind the successors, lessees and assigns of the parties hereto to the same extent that it applies, benefits and binds such parties.

Sixteenth. The party of the first part hereby agrees that upon the request of the party of the second part, the party of the first part or the officer or official who may at the time be discharging the functions of the Commissioner of the Interior of Porto Rico, in representation and on behalf of The People of Porto Rico, will execute a public document embodying this agreement in conjunction with the party of the second part, and the party of the second part hereby agrees that it will execute, upon the request of any Commissioner of the Interior of Porto Rico, duly appointed and acting as such, or in case the office of Commissioner of the Interior shall be abolished by Act of Congress, then and in such event upon the request of the officer or official duly appointed under an Act of Congress to perform the duties and functions now performed by the Commissioner of the Interior, a public document embodying this agreement, and each party hereby agrees that it will cooperate with the other in taking all steps necessary

to have this agreement or the public document embodying the same duly recorded in the proper Registry of Property and will execute or cause to be executed such documents and papers as may be necessary or proper to this end; and it is further specifically agreed that failure on the part of either party to comply with the provisions of this clause Sixteenth shall constitute a total breach of this agreement and that the other party hereto, unless such breach be waived by it, shall thereupon be entitled to the exercise of any or all of the rights it had at the time this agreement was entered into, as if this agreement had never been entered into or performed in whole or in part by either party hereto.

In witness whereof The People of Porto Rico have caused these presents to be signed by the Acting Commissioner of the Interior, acting in representation and on behalf of The People of Porto Rico, and Fortuna Estates has caused these presents to be signed by its attorney in fact, Julius Umbach, all on the day and year first hereinabove written.

E. S. WHEELER,

Acting Commissioner of the Interior.

JUL. UMBACH,

Attorney in fact of Fortuna Estates.

F. MANUEL TORO.

Witness: M. Lozano.

Island of Porto Rico

City of Ponce, ss., Affidavit No. 400.

On this twenty-sixth day of August, 1914, before me, a notary public, personally came and appeared Julius Umbach, of age, merchant, a resident of the City of Ponce, to me personally known, and acknowledged that he signed the foregoing instrument as attorney in fact of Fortuna Estates.

F. MANUEL TORO,

Notary Public.

Island of Porto Rico

City of San Juan,

Notaria de Monserrat. Affidavit No. 1397.

On this twenty-eighth day of August, 1914, before me, a notary public, personally came and appeared Ernest S. Wheeler, of age, married, Acting Commissioner of the Interior, a resident of the City of San Juan, to me personally known, and acknowledged that he executed the foregoing instrument in representation and on behalf of The People of Porto Rico.

DAMIAN MONSERRAT,

Notary Public.

"SCHEDULE A"

Names of the Property	Dates of Irrigation Concessions	Dates of Royal Decrees
Luciana	December 23, 1848	June 8, 1880.
Cristina	March 17, 1852	June 8, 1880.
Fortuna	October 5, 1846	June 8, 1880.
Serrano	September 26, 1845	June 8, 1880.

"SCHEDULE B"

Names of the Properties	Dates of Concessions	Torrential width of intakes	Royal Decrees
Luciana	September 1, 1878	1 meter	June 8, 1880
Fortuna	January 10, 1879	1 meter	June 8, 1880
Serrano	November 21, 1878	1 meter	June 8, 1880

J. U.

At the termination of the above contract and Schedule "A" and "B" there also appears another schedule marked "D" referring to certain water distribution, and also Schedule "C" which is a blue print and if being impracticable to copy these two last mentioned documents in this instrument, the originals thereof are hereto annexed and made a part hereof and are herein protocolized and made a part of this document, from which copies should be issued hereafter.

The appearing party, Manuel V. Domènech, in representation

of and on behalf of The People of Porto Rico, and the appearing party Julius Umbach, in representation of and on behalf of the Fortuna Estates, declare and agree that the private contract hereinabove referred to, copied and inserted, is nor [*sic*] and shall continued [*sic*] in full force and effect and that the said contract and all provisions thereof are and shall continue to be binding upon their respective principals represented by them in this proceedings, and they hereby on behalf of their said principals respectively accept, ratify and confirm the said private contract and each and every clause and provision thereof; and in compliance with the agreement therein contained to embody said private contract in a public instrument they now do so by these presents and desire that embodying of the same herein shall have the same legal effect and the same force as if the same had been executed in a public instrument in the first instances.

Such is the public instrument executed by the appearing parties, which they execute, accept and sign before the undersigned notary public and in presence of the witnesses Francis E. Neagle and Enrique Castro, who are residents of this city and competent to be such, and who are personally known to me, and I, the notary, hereby certify to all of the statements herein set forth:

Francis E. Neagle,
Enrique Castro Gonzalez.

MANUEL V. DOMENECH,
JUL UMBACH,
FRANK ANTONSANTI.

I hereby certify that the foregoing is a true and correct copy of the above contract executed by the parties therein on the date therein expressed, the original thereof remaining in my protocol and bears number twenty.

In witness whereof, and for the purpose of delivery to the Fortuna Estates, I issue this copy on the same day, month and year of its execution. Interlineation—to—quantities—or to be adopted,—are noted.

FRANK ANTONSANTI

(Internal Revenue Stamp)

DEFINITE CHART SHOWING THE DISTRIBUTION OF THE WATERS OF THE JACAGUAS RIVER, ISLAND OF PUERTO RICO

Name of the Estates	Date of the Irrigation Concessions	Total superficial area of the estates Cuerdas	Hectares	Lands entitled to irrigation Hectares	Coefficient adopted per hectare and seconds	Liters of water per second	Order Number for the Suspension of the Irrigation Service
Fountain in the town of Juana Díaz						4.00	13
Luciana	December 23, 1848	619.73	243.68	117.91	0.70	82.54	5
Cristina	March 17, 1862	784.00	308.14	152.49	0.70	106.74	4
Fortuna	May 8, 1841	794.00	312.07	199.64	0.70	139.75	12
Potata	October 5, 1846				0.70	157.09	8
	April 25, 1846	1,785.00	701.57	224.42			
Amelia	June 21, 1859	1,378.77	541.91	294.00	0.70	205.80	6
Urepla	October 30, 1846						
	March 3, 1846	1,775.00	696.86	171.68	0.70	120.17	9
Unión	July 26, 1855	382.00	150.14	79.21	0.80	39.60	7
Serrano	October 2, 1846	557.60	219.15	204.93	0.50	102.47	10
	September 26, 1845			100.67	0.70	67.04	11
	May 14, 1845	878.84	345.41	125.58	0.50	133.28	3
Boca Chica	November 7, 1860					56.22	
San Fernando	March 7, 1867		75.54	75.54	0.70	52.88	1
Placeres	April 20, 1870	612.00	240.54	31.44	0.70	22.00	2
	By prescription, 1865					1166.30	

Madrid, June 8, 1880. Approved by H.M. - Sanchez Bustillo

True copy: Secretary of the General Government - Francisco Fontanals-Martinez

EXHIBIT B.

TO ANSWER.

"UNION" AND "PLACERES" CONTRACT.

Memorandum of Agreement made this twenty-sixth day of August, 1914, between Ernest S. Wheeler, Assistant Commissioner of the Interior, discharging since January 17, 1914, the duties and functions of Commissioner of the Interior of Porto Rico, now in discharge of such duties and functions and in possession of said office and acting as such Commissioner of the Interior of Porto Rico, in representation and on behalf of The People of Porto Rico, party of the first part, and Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella y Cortada and Sergio Torruella, party of the second part.

Whereas, Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella y Cortada and Sergio Torruella, are the owners in fee simple of two (2) tracts of land situated in the Municipality of Ponce, in the District of Ponce, in the Island of Porto Rico, and claims as appurtenant thereto, by virtue of certain concessions, royal decrees of Kingdom of Spain and user, the right to use thereon waters from the River Jacaguas for the irrigation thereof, the said land and water rights being generally described as follows:

1. One tract known as the Estate "Union", comprising as shown on the table "Cuadro Definitivo de Distribucion de Aguas del Rio Jacaguas", of June 8th, 1880—approximately 150.14 hectares of land, with an appurtenant right to take from the River Jacaguas for the irrigation thereof, 39.60 liters of water per second, equivalent to 1,013.56 acre feet of water per year for said Estate "Union".

2. One tract known as the Estate "Placeres", comprising—as shown on the table "Cuadro Definitivo de Distribucion de Aguas del Rio Jacaguas", of June 8, 1880—approximately 240.54 hectares of land, with an appurtenant right to take from the River Jacaguas, for the irrigation thereof, 22 liters of water per second,

equivalent to 565.75 feet of water per year for said Estate "Placeres".

And Whereas, Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella y Cortada and Sergio Torruella and its predecessors in title have been for upwards of twenty years and are now taking waters from the river Jacaguas for irrigation of said tract of land, and claims to have been doing so under and by virtue of the said concessions and the said royal decrees of the Kingdom of Spain, granting, approving and confirming the water rights aforesaid (a partial list of said concessions and decrees being hereto annexed and marked "Schedule A"), such waters having been taken from the bed of said River Jacaguas through intakes built and established for the purpose by the predecessors in title of Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella y Cortada and Sergio Torruella; and

Whereas, Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella y Cortada and Sergio Torruella, also claim the right to take for the irrigation of the said two (2) tracts of land hereinabove mentioned torrential waters from the bed of the Jacaguas River during the time of high water without limit as to quantity except as limited by the size and the location of the intakes and the canals leading therefrom to the respective tracts of land aforesaid (a list of the concessions therefore, being hereto annexed and marked "Schedule B"), and that said rights for the taking and use of such torrential waters have been exercised by Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella y Cortada and Sergio Torruella, and their predecessors in title for upwards of twenty years, and are now so exercised; and

Whereas, The People of Puerto Rico has authorized and undertaken the construction of a public irrigation system, in accordance with the Public Irrigation Law approved September 18, 1908, and the amendments thereto, and has recently, in the construction of said irrigation system, erected a dam (known as the Guayabal dam) across the bed of the said Jacaguas River above the said intakes which the said Jose A. Poventud, Isabel Cortada Vda. de

Poventud, Juan Torruella y Cortada and Sergio Torruella use for taking water for irrigating its said two tracts of land in accordance with its said claim of right; and The People of Porto Rico proposes to use the said dam for the impounding and storage of a part of the waters of the River Jacaguás and of the River Toro Negro, a stream rising on the north side of the main watershed of the Island of Porto Rico, whereby the source of supply of the waters which the Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella, claim to be entitled to by reason of the aforesaid concessions, royal decrees and user for the irrigation of the two tracts of land aforesaid, may be interrupted and impaired; and

Whereas, said water rights and concessions have not been relinquished or surrendered to The People of Porto Rico and said Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella y Cortada and Sergio Torruella is unwilling to enter into any agreement or arrangement for the relinquishment or surrender of the said water rights and concessions; and

Whereas, the amount of water taken by the Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella and its predecessors in title for the irrigation of said two tracts of land under its said claim of water rights varies from month to month in accordance with the rainfall in the watershed of the said Jacaguas River, so that it is impossible to determine in advance the exact amount of water to which the said Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella are entitled under the said claimed water rights for any fixed period of time, and The People of Porto Rico (notwithstanding the construction and operation of said Guayabal Dam) is ready to deliver from the said Jacaguas River to the said Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella the amount of water to which the latter may be entitled under its said concessions, but in order to facilitate and make more certain the operation of the said dam and the irrigation system of which it is a

part, desired to determine and agree upon an amount of water which, delivered regularly, may, under all attending circumstances, be considered to be the fair equivalent in value for irrigation purposes of the amount of water which the Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella would under ordinary circumstances take and use under the said water rights and concessions; and

Whereas, the Commissioner of the Interior is authorized and empowered, by Section 13 of the amendment to the Public Irrigation Law, approved August 8, 1913, after consulting with the Attorney General of Porto Rico as to the validity and legal status of the said water rights or concessions to enter, on behalf of The People of Porto Rico, into agreement with the owner of the said water rights or concessions, upon an amount of water equivalent to the water taken and used under said water rights and concessions and as to the time, place and conditions of delivery thereof to the lands to which the said water rights or concessions are appurtenant; and

Whereas, the Attorney General of Porto Rico has been duly consulted, as provided by said Act;

Now, therefore, in consideration of the premises and of the covenants and agreements on the part of each party hereinafter contained, the said Acting Commissioner of the Interior in representation and on behalf of The People of Puerto Rico, party of the first part, and the said Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella, do hereby covenant and agree as follows:

First: The parties hereto hereby agree that the quantities of water specified in this paragraph, delivered uniformly throughout the year, subject to the terms and conditions specified in this agreement, together with the additional water the right to take which is provided for or reserved in paragraph third and fourth hereof, are the fair equivalent in value of the water which the said Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella takes under and pursuant

to the concessions and water rights claimed by it, and The People of Porto Rico will, subject to the conditions and limitations hereinafter specified and at the times, places and subject to the conditions of delivery, hereinafter provided for, make delivery to the Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella, for the irrigation of the said tracts of land hereinabove referred to, of the amount of water, to wit:

For the Estate "Union", 760.17 acre-feet per year,
For the Estate "Placeres", 186.38 acre-feet per year.

The waters so to be delivered shall be delivered subject to the conditions hereinbelow expressed, in substantially equal quantities from day to day, to wit:

For the Estate "Union", 2.08 acre-feet daily;
For the Estate "Placeres", 0.51 acre-feet daily.

Second. Except in the case of shortage in the reservoir behind the Guayabal Dam herein provided for, the water deliverable hereunder for the Estates Union and Placeres shall be delivered at the present intakes of the respective estates, or may at the option of the Irrigation Service be delivered at any part of the canal of the respective estates equally advantageous to the owners of the said estates.

(The water for Union to be taken by pump.)

Third. Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella are hereby granted the right, while this agreement remains in force, to take in addition to all amounts of water above specified, from the Jacaguas River, by pump, at the Union pumping station, water which may be available there for irrigation of any of the lands to the extent that such takings shall not deprive any owner or user of subsisting water rights or concessions upon the Jacaguas River of the water to which such owners or users may be entitled, either by virtue of such water rights or concession or by virtue of any agreement or agreements in regard thereto entered into or to be

entered into by them with The People of Porto Rico, provided, however, that should The People of Porto Rico at any time undertake the development and utilization of the surplus waters in this part of the Jacaguas River, this right shall be understood to be limited to a maximum usage of 1.40 second feet.

Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella, shall install within sixty days after notice from the Irrigation Service and maintain at the Union Pumping Station, an appropriate measuring device for the measurement of the water taken from the river at such station, which shall, at all times, be subject to inspection by the properly accredited employees of the Irrigation Service.

Fourth. In addition to the amounts of water hereinbefore set forth, the Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella hereby reserve and shall have the right to take torrential waters from the Jacaguas River through its head-gates at present existing for the use of torrential waters. Such head-gates, whenever they do not conform to the terms of the concessions, shall be reconstructed in conformity therewith, and such use of torrential waters shall be subject to such priorities in the use of torrential waters as may exist on the said Jacaguas River. The foregoing provisions, however, shall not in any way limit The People of Porto Rico from restraining all of the torrential flood waters which it may desire, and which it may be legally entitled to restrain in the reservoir above the Guayabal Dam.

To the extent that there may be waters derived through underground filtration or seepage from the River Jacaguas or its tributaries or from the reservoir maintained behind the said Guayabal Dam, which rise to or near the surface of the ground within the boundary lines of any so-called "semi-poyal" portions of any of the tracts of land owned, leased, operated or cultivated by the Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella, its successors or assigns, or any waters derived in wells made or to be made upon any portions of

said lands, or any of them, which are not strictly subterranean waters, within the meaning of that term as used in the laws of Porto Rico and the full property of the owner or possessor of said lands, the said Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella, its successors, lessees or assigns, while this agreement remains in force, may make use of the said waters and all portions hereof in such manner and for such purposes as it or they shall from time to time elect, without payment or responsibility to The People of Puerto Rico for or in respect thereto, except in so far as such right and the means adopted or to be adopted for its exercise may be limited, modified or restricted by the provisions of the Law of Waters.

Fifth. During ten days in each year, while this agreement is in force, The People of Puerto Rico shall deliver to said Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella, and the latter may take and use at its present intakes in the Jacaguas river, as indicated upon the annexed chart furnished by Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella (marked "Schedule S"), built and used for said respective tracts of land, in lieu of all quantities of water elsewhere specified in this agreement except in Section Fourth, the amount of water which said Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella claims to be entitled to take for each of said two tracts of land under the said concessions and water rights, to wit:

For the Estate Union, 39.60 liters of water per second (to be taken by pump).

For the Estate Placeres, 22 liters of water per second.

The presence of water in the river bed of the Jacaguas river, at the openings of the said intakes, in quantities sufficient to permit the taking by the Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella of the quantities of water specified in this paragraph, shall be deemed a

delivery in accordance with this paragraph on behalf of The People of Puerto Rico.

Twenty-four hours' notice shall be given by or on behalf of the Irrigation Service, to the manager of or other person in authority upon the Union and Placeres Estates, of the proposed delivery of water to the Union and Placeres Estates in accordance with the terms of this section instead of in accordance with the other terms of this agreement.

Sixth. Whenever and as long as there is no storage water in the reservoir behind said Guayabal Dam, the People of Porto Rico shall deliver subject to the terms of this agreement, to José A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella, the quantities of water herein provided for from the flow of the Jacaguas river exclusive of water added thereto from the Toro Negro river; but such delivery shall be subject to be cut off or diminished when so long as and to the extent that such flow is insufficient to supply all water deliverable to the owners or users of subsisting valid water rights or concessions having priorities for the use of the waters of the Jacaguas River, whether by virtue of such rights or concessions, by virtue of valuations made in accordance with the Public Irrigation Law, or by virtue of agreement with regard thereto entered into between such owners or users and the Commissioner of the Interior or any other person or body authorized by law to enter into such agreement, in representation of The People of Puerto Rico, in accordance with the "Order of Suspension" established in the Definitive Table of Distribution of the Water of the River Jacaguas, approved by royal decree of June 8, 1880, a copy of which is hereto annexed marked "Schedule D".

The People of Porto Rico shall have the right to divert from the reservoir behind the Guayabal Dam into the Juana Diaz Canal, or any other canals of the Irrigation System, the amount of water flowing into the reservoir from the Toro Negro River or from any other source than the Jacaguas River, whether or not there is any storage of water in the Guayabal reservoir; and it is further

understood and agreed by and between the parties that, as far as Jose A. Poventud, Isabel Cortada Vda. de Poventud; Juan Torruella Cortada and Sergio Torruella are concerned, The People of Puerto Rico may divert all the waters of the Jacaguas River, to which Jose A. Poventud, Isabel Cortada Vda. de Poventud; Juan Torruella Cortada and Sergio Torruella are not entitled as specified in this agreement, into the Juana Diaz Canal or any other canal, ditches or reservoirs of the Irrigation System.

It is understood and agreed that the expression "storage water" does not include water in the said reservoir not rising to a height more than three feet above the bottom of the outlet gates to the Juana Diaz Canal.

Seventh. In the event that, for any cause, whether within or beyond the control of The People of Porto Rico (except in the case hereinbefore provided for) the delivery of water to Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella, at any point shall be temporarily partly or wholly interrupted, The People of Porto Rico shall, during the continuance of such cause, deliver an equivalent amount of water to the Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella at some other proper and useful point in the irrigation canals of Union and Placeres Estates, to be selected by the Irrigation Service.

Eighth. The People of Porto Rico consents that, to the extent that the owners or users of valid and subsisting water rights may not be prejudiced, Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella may apply the water deliverable hereunder or any part of it to the irrigation of any of the lands hereinbefore described, or any part or portions thereof.

Ninth. It is further specifically understood and agreed by and between the parties hereto that any temporary or other arrangement made between the said Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella, their successors, lessees, or assigns, or representative thereof and

any official of the Government of Porto Rico with respect to the taking and use of waters from the River Jacaguas, the measurement of such waters, the building of reservoirs, canals, siphons and pipelines, the diversion of waters from one tract of land to another, the time during which waters shall be delivered from time to time, the amount of water to be delivered at any point or points at any time or times, the purchase of surplus water from time to time, or any other matters connected with the use of the said waters of the Jacaguas river, and the irrigation therewith of the lands owned, leased and cultivated by the Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella, its successors or assigns, shall at all times and for all purposes be deemed to be subject to the terms and provisions of this agreement, and shall not affect or modify the same or be deemed or considered so to do or to affect or prejudice the rights of either party hereunder.

Tenth. It is agreed by both parties that the delivery to and the use by the Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella of water in accordance with the terms and conditions expressed in this agreement shall not in any event affect or modify the present existing status of the water rights and concessions claimed by the said Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella; but that such delivery and use is to be made in view of the modified physical conditions resulting in the bed of the river Jacaguas from the establishment of the public irrigation system, which on the one hand will henceforth permit the delivery to and the use by the Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella of a substantially uniform of water as provided in this agreement, and on the other modifies to some extent the use of the water heretofore made by Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella that such delivery and use shall continue as long as such modified conditions continue to exist, and in the event of the total or par-

tial destruction of the Guayabal Dam, or of the main canal known as the Juana Diaz Canal, connected therewith, from any cause whatsoever, and the resulting inability of The People of Porto Rico to comply with the terms of this agreement, the Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella may forthwith exercise and enjoy such rights as it has under the said concessions and grants, but as soon as The People of Porto Rico shall have re-established or reconstructed the works so destroyed in substantially the same form as at present constructed, or in such a manner as to enable it to perform substantially the terms of this agreement, this agreement shall be revived and be in full force and effect from such time.

Eleventh. Neither the execution of this agreement by the Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella nor the acceptance and use of water delivered to it as herein provided; nor any consent, waiver or permission given or held to be given hereby, or hereunder nor any failure on the part of Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella, acting in accordance with this agreement, to take and use water in accordance with the exact terms of its said concessions and water rights, or any of them, nor anything done or suffered by said Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella hereunder or in accordance with the terms hereof or pursuant to the provisions herein contained shall at any time or for any purpose be deemed to affect, modify or change to any extent the status of said water rights and concessions claimed by the Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella as existing at the time this agreement was entered into or to limit or prejudice any rights or privileges which the Jose A. Poventud, Isabel Cortada Vda. de Poventud, Juan Torruella Cortada and Sergio Torruella, its successors or assigns, may have under or by virtue of the said concessions, and the grants and decrees respecting the same hereinabove described, or by virtue of the use

of the said waters of said Jacaguas River heretofore made by it and its predecessors in title.

Twelfth. Nothing in this agreement contained shall be taken to impair or abridge such rights as The People of Porto Rico may have, to modify, enlarge or improve any of the works or structures thereto.

Thirteenth. This agreement shall apply to, benefit and bind the successors, lessees and assigns of the parties hereto to the same extent that it applies to, benefits and binds such parties.

Fourteenth. The party of the first part hereby agrees that upon the request of the party of the second part, the party of the first part of the officer or official who may at the time be discharging the functions of the Commissioner of the Interior of Porto Rico, in representation and on behalf of The People of Porto Rico, will execute a public document embodying agreement in conjunction with the party of the second part, and the party of the second part hereby agrees that it will, upon the request of any Commissioner of the Interior of Porto Rico duly appointed and acting as such, or in case the Office of the Commissioner of the Interior shall be abolished by Act of Congress, then and in such event upon request of the officer or official duly appointed under an Act of Congress to perform the duties and functions now performed by the Commissioner of the Interior, a public document embodying this agreement, and each party hereby agrees that it will cooperate with the other in taking all steps necessary to have this agreement or the public document embodying the same duly recorded in the proper Registry of Property and will execute or cause to be executed such documents and papers as may be necessary or proper to this end; and it is further specifically agreed that failure on the part of either party to comply with the provisions of this clause fourteenth shall constitute a total breach of this agreement and that the other party hereto, unless such breach be waived by it, shall thereupon be entitled to the exercise of any or all of the rights it had at the time this agreement was entered

into as if this agreement had never been entered into—or performed in whole or in part by either party hereto.

In witness whereof The People of Porto Rico have caused these presents to be signed by the Acting Commissioner of the Interior, acting in representation and on behalf of The People of Porto Rico, and the parties of the second part do for themselves sign these presents, with the consent and approval of "Fortuna Estates", through its attorney in fact Julius Umbach and as sub-lessees of "Union and Placeres", all on the day and year first hereinabove written.

Witnesses:

M. Lozano

E. S. WHEELER,

Wm. L. Aguayo

Acting Commissioner of the Interior.

JOSE A. POVENTUD

ISABEL CORTADA VDA. DE POVENTUD

JUAN TORRUELLA Y CORTADA

SERGIO TORRUELLA

Parties of the second part

JUL. UMBACH,

Attorney in fact of Fortuna Estates.

[The same title.]

MOTION.

Now comes the plaintiff by its undersigned attorneys, and respectfully states and prays:

1. That in this case The People of Puerto Rico and in its behalf Manuel V. Domenech, Treasurer of Puerto Rico, has appeared as plaintiff.

2. That the aforesaid Manuel V. Domenech, officially ceased as Treasurer of Puerto Rico, as the Governor of Puerto Rico appointed Rafael Sancho Bonet to said office and the appointment was affirmed by the Insular Senate, the said Sancho Bonet having qualified and being at present the Treasurer of Puerto Rico.

3. That for the foregoing reasons it is only proper that the

said Rafael Sancho Bonet be substituted in the place and stead of Manuel V. Domenech.

Wherefore, plaintiff prays that the corresponding order be entered by this court.

San Juan, Puerto Rico, August 21, 1935.

BENJAMIN J. HORTON, *Attorney General*,
by M. RODRIGUEZ SERRA,
Assistant Attorney General.

Copy served this twenty-first day of August, 1935.

R. CASTRO FERNANDEZ,
Attorney for the Defendant.

Motion sustained September 9, 1935.

PABLO BERGA, *Judge*.

[New title.]

STATEMENT OF THE CASE AND OPINION.

On June 24, 1930, The People of Puerto Rico brought suit before the District Court of San Juan against Russell & Co., S. en C., a limited partnership organized under the laws of Puerto Rico, to recover the sum of \$61,617.04, as taxes levied and assessed in accordance with the provisions of Act No. 49 of July 8, 1921, which tax is dedicated exclusively to cover the administrative expenses and upkeep of the irrigation system of the southern coast district of this island, averring therein that the defendant has been benefited with said system and receiving the whole volume of water agreed for certain parcels of land situated in the municipality of Juana Diaz, in conformity with a certain contract executed on August 26, 1914, between their owners, predecessors in title of the defendant, and the Commissioner of the Interior.

The defendant, through its partners Horace Havemeyer, Frank A. Dillingham, Edward S. Paine, Edwin L. Arnold, H. B. Orde and Frank M. Welty, on July 24, 1930, moved for a change of venue to the United States District Court for Puerto Rico and its

motion was granted by this court on the 19th of said month and year.

The case was decided against The People of Puerto Rico and the latter appealed to the United States Circuit Court of Appeals for the First Circuit, where the decision of the Federal Court was affirmed by holding that Act. No. 49 of July 8, 1921, was null and unconstitutional. *People of Puerto Rico v. Havemeyer et al.*, 60 Fed. (2d) 10. Later a writ of certiorari was obtained from the United States Supreme Court and on March 13, 1933, the judgment of the Circuit Court was reversed for the sole reason that the Federal Court had acted without jurisdiction as there was no diversity of citizenship between the parties to the suit, as Russell & Co., S. en C. is a limited civil partnership domiciled in Puerto Rico, where it was organized. *Puerto Rico v. Russell & Co.*, 288 U.S. 476. The Supreme Court of the United States did not consider the question of the constitutionality of the law under which the tax was levied.

The case having been remanded to this court, on June 8, 1934, the plaintiff presented an amended complaint with the sole object of increasing the amount claimed to, \$97,668.88, that is, \$70,332.76 as taxes, and \$27,336.12 as surcharges, said taxes corresponding to the years 1922-23 to 1933-34.

The aforesaid Act No. 49 of July 8, 1921 is entitled: "An Act fixing a tax on certain lands using water from the southern coast public irrigation system, on which lands no tax whatsoever was levied under the public irrigation law, and for other purposes." And the public irrigation act for the southern coast, approved September 18, 1908, is entitled: "An Act to provide for the construction of an irrigation system, and to provide revenues therefor; for the temporary appropriation of two hundred thousand dollars to begin such work, and for other purposes." This act was amended in 1911 and 1913.

The amended complaint alleges that the properties described therein were not and are not subject to the payment of any tax for irrigation under the provisions of the act of 1908, as amended,

and that since 1915 they have received and continued to receive the whole amount of the water stipulated for irrigation purposes by virtue of the contract of August 26, 1914. The theory of the complaint is that the defendant receives benefit from the system, inasmuch as it receives the whole amount of water stipulated for irrigation purposes, and that the lands are subject to the payment of the special tax, and that it has refused to pay the same, in spite of the numerous demands that, from time to time, the Treasurer of Puerto Rico has made of the defendant since the year 1922. Plaintiff claims that the gist of the cause of action is not the contract, but the legal obligation of the defendant, arising from the act of 1921.

In its answer the defendant admits some facts and denies others; the contracts executed for the irrigation of Fortuna, Cristina, Luciana, Serrano, Union and Placeres estates, are made a part of the answer; and the defendant alleges furthermore, as a defense, that it is in possession of said estates and that it owns certain rights of ordinary and torrential water, by virtue of certain concessions or rights from the Crown of Spain, and of certain authorization to use said lands for irrigation purposes, from the Jacaguas river, in the municipality of Juana Diaz, Puerto Rico.

As a question of law the defendant alleges that Act No. 49 of 1921, under which plaintiff claims authority to assess the tax and surcharges, is illegal, unconstitutional and void for the following reasons:

(a) Because it impairs the obligations contracted under the contracts.

(b) Because it delegates legislative powers to the Commissioner of the Interior.

(c) Because it attempts to assess a special tax over certain lands without the corresponding benefit to said lands or their owners, thus depriving the defendant of its property without due process of law.

(d) Because it attempts to confiscate property rights of the defendant, to wit: the aforesaid water rights corresponding and

forming part of said parcels, thus depriving the defendant of its property without due process of law, and condemning private property for public purposes without due compensation.

(e) Because it attempts to assess a tax on the property of the defendant solely and not over other properties in the Island of Puerto Rico, thus violating the uniformity rule contained in the Organic Act.

(f) Because it violates the Treaty between the United States and Spain, known as the Treaty of Peace, of 1898, and impairs and destroys property rights of the defendant granted by the Spanish Government.

(g) Because it attempts to assess the aforesaid tax on a limited kind of lands arbitrarily selected and without receiving any benefit, thus violating the clause which guarantees the equal protection of the laws.

(h) Because it assesses a tax without containing any provision as to notice or opportunity to be heard, and without granting the right of appeal or review.

The defendant alleges furthermore that the action has prescribed because the same was not brought until June 24, 1930, that is, two years and 2 months after Act. No. 302, of April 23, 1928, was approved by the Congress of the United States. This act simply grants a term of one year to collect, through a legal action, any tax whose collection might have been restrained through an injunction proceeding, as happened in the present case by decree of June 12, 1926.

The hearing of this case was held on September 11, 1935. Both parties appeared and the case was submitted through a stipulation of facts signed by the parties and furthermore, in so far as the plaintiff is concerned, through the testimony of Antonio Eucetti and Juan Martinez Chapel, and documentary evidence consisting of certain plans and certificates in connection with the irrigation system of the southern coast.

From the pleadings of the parties, stipulation of facts, evidence adduced and laws applicable, the court finds that the defendant

partnership, Russell & Co., Sucrs., S. en C., is the absolute owner of Fortuna, Cristina, Luciana and Serrano Estates, described in the complaint, and that it is also the lessee, subject to the payment of all kind of taxes, of Union and Placeres Estates, belonging at present to Jose A. Poventud, Sergio Torruella Cortada and heirs of J. Serralles; all these parcels bound with the Jacaguas river, in the jurisdiction of Juana Diaz, Puerto Rico, the Jacaguas being a non-navigable river flowing into the Caribbean Sea. That the Crown of Spain, through royal decrees, made concessions for irrigation purposes to the owners at the time of said estates and under said concessions they were allowed to take from the Jacaguas river, the amounts of water specified in the stipulation; that for over 20 years prior to the 26th of August, 1914, the said grantees and Fortuna Estates; predecessors in title of the defendant, took and used said water for the irrigation of the aforesaid estates; that the defendant on acquiring Fortuna, Cristina, Luciana and Serrano estates acquired also the aforesaid water rights and has been taking and using said water for the same purpose, and that, as an incident to the lease, the defendant is grantee of the water rights enjoyed by Union and Placeres estates; that The People of Puerto Rico, in accordance with the public irrigation act of September 18, 1908, as amended in the years 1911 and 1913, constructed the public irrigation system for the southern coast of Puerto Rico, and as part of said irrigation system it built a dam to store and accumulate part of the water of the Jacaguas river. This dam being known as Guayabal Dam, extends across the bed of said river and is situated above the intakes. that the predecessors in title of the defendant used for taking and using the water to which they were entitled, under the aforesaid concessions and royal decrees of the Crown of Spain; that the public irrigation act of September 18, 1908, provided in Section 12 the manner of acquiring the existing water rights from the Jacaguas river, by condemnation proceedings or by contracts waiving them, the owners of said rights to receive credit for their proportional share in the expenses of construction.

operation and maintenance of the irrigation system; that Act No. 128 of August 8, 1913, amended the aforesaid public irrigation act and authorized the Commissioner of the Interior to contract with the owners of the water rights in such a wise that the latter, in exchange for the water they took, received from the irrigation system an amount of water equivalent in value to that which they were entitled to receive under their respective concessions; that as Fortuna Estates, predecessor in title of the defendant, and the owners of the concessions existing in favor of Union and Placeres estates; refused to waive, abandon or relinquish their respective rights and it was decided not to condemn said lands, then The People of Puerto Rico entered into negotiations with the grantees and the contracts of August 26, 1914 were then entered into. These contracts were embodied into a public deed, on June 8, 1915, which deed forms part of the amended answer (Exhibits A and B). These contracts determined the equivalent in value of the water rights corresponding to each of the estates and stipulated furthermore the form, manner and daily amount of water that the irrigation system was bound to supply to each of said estates; that since the year 1915 to the present, the irrigation system of the southern coast, has been, in conformity with the contracts, supplying and delivering for the irrigation of said Fortuna; Cristina, Luciana, Serrano, Union and Placeres estates the amount of water stipulated. That Act No. 49, of July 8, 1921, fixed a special tax on the parcels of land receiving water from the public irrigation system of the southern coast, to which the public irrigation act levied no tax. Among these lands were the estates of which the defendant is in possession, either as owner or lessee; and that in conformity with the said act the Treasurer of Puerto Rico levied and assessed on the aforesaid parcels of land or estates, as special tax for the years 1922-23, to 1933-34, both inclusive, the sum of \$70,332.76, which sum has not been paid, and for the recovery of which, plus surcharges amounting to \$27,336.12, the present action has been brought.

The stipulation also states as a fact shown that the complaint

in case No. 1250, entitled *Horace Havemeyer et als. v. Juan G. Gallardo*, Treasurer of Puerto Rico, *in re* injunction, filed in the District Court of the United States for Puerto Rico, after a trial on the merits of the case, a final decree was entered granting an injunction to restrain the assessment and collection of the tax under Act No. 49 of July 8, 1921; and that said final decree was appealed to the United States Circuit Court of Appeals for the First Circuit, and that while the appeal was pending on March 4, 1927, the Congress of the United States approved an act to amend the Organic Act of Puerto Rico, which abated the said appeal and dissolved the writ of injunction.

The testimony of Antonio Luchetti, chief engineer of the Irrigation Service, tended to show that the defendant has received benefits from the irrigation system and as a result of the contracts entered into with The People of Puerto Rico, the said benefits being that when the aforesaid estates by virtue of the concessions and rights granted by the Crown of Spain enjoyed the right to take water for irrigation purposes; in times of draught, they did not receive the total amount of water to which they were entitled, as there was not enough; and furthermore because during the rainy season the torrential water flooded the lands to the prejudice of the agriculture and the water was lost in the sea without benefit to any one, while at present the irrigation system, with its wonderful dam at Guayabal Lake and with the construction of pools at Toro Negro and Matrullas river, permits the storage of water and the estates receive the total amount of water stipulated in the contracts but not a single additional drop. And the testimony of Juan Martínez Chapel, appraiser of corporations and officer in charge of irrigation matters in the Treasury Department, tended to show the form and manner in which the rate of the special tax for irrigation is reached for those who do not pay the other tax fixed by the irrigation act. This procedure is as follows: The Commissioner of the Interior figures the amount necessary to cover the cost of maintenance and conservation of the irrigation system for the next fiscal year,

deducting therefrom the amount corresponding to the hydroelectric system and deducting the amount estimated by said Commissioner as income for said year from the sale of water. A surplus is credited or a deficit added to the budget of the following year. The resulting total is divided by the total number of acres, in order to determine the rate of the annual tax per acre. The blanks used every year by the Treasury Department for the classification of the tax and to demand from the owners of the land the payment of same, were also presented in evidence. Mr. Martinez Chapel testified that he was the officer who fixed the rate of tax to be paid by each parcel of land, in accordance with the estimates made by the Commissioner of the Interior.

Section 2 of Act No. 49, of July 8, 1921, impeached herein, provides the form and manner in which the tax is to be fixed, and reads as follows:

"That the tax to be levied on each tract of land receiving water from the irrigation system, but which under the law in force does not contribute towards defraying the cost of such system, shall be classified as follows: The Treasurer of Puerto Rico shall have charge of fixing the total number of acres receiving water from the irrigation system which includes: (1) tracts of lands subject to taxation pursuant to the provisions of the public irrigation law and amendments thereto, for the purpose of reimbursing the cost of the irrigation works; (2) tracts of land to which the Irrigation Commission acknowledged the right to the use of water or to which such right was acknowledged by the courts in cases of appeal, as rights acquired under the law for the use of water under prior concessions; (3) tracts of land irrigated with water delivered in accordance with acquired rights or concessions which have not been assigned, which said water, pursuant to the terms of the contracts entered into with the Commissioner of the Interior or because of decisions of the Irrigation Commission, is delivered in whole or in part and is measured at the canals of the Irrigation Service system,

and such tracts shall be determined by dividing the value of the said concessions in acre-feet per year, as the same may be or shall have been fixed by the Commissioner of the Interior, by the Irrigation Commissioner or by decision of the courts, by four,—that is to say, by the number of acre-feet per year established by the Public Irrigation Law as a normal rate for delivery per acre for the formation of the irrigation district; (4) parcels of land irrigated by water supplied because of acquired rights or concessions which have not been assigned, which said water, pursuant to the terms of the contracts entered into with the Commissioner of the Interior or under decisions of the Irrigation Commission, is taken and measured in the rivers at the points of intake indicated in the said concessions; and such tracts shall be determined by dividing the value of the said concessions in acre-feet per year, as the same may be or as shall have been fixed by the Commissioner of the Interior, by the Irrigation Commission or by decision of the courts in cases of appeal, by five. The Treasurer of Puerto Rico shall then take amount estimated or certified to as estimated by the Commissioner of the Interior for defraying the cost of operations and maintenance of the irrigation system during the following fiscal year (as provided under Section 11 of Act 128, approved August 8, 1913, which amends the Irrigation Law approved September 18, 1908), and shall add thereto or subtract therefrom, as the case may be, any resulting deficit between or surplus over, the amount expended and certified to as expended by the Commissioner of the Interior for expenses of operation and maintenance of the irrigation system during the preceding fiscal year, and the amount estimated or certified to as estimated by the Commissioner of the Interior for defraying the cost of operation and maintenance of the irrigation system during the aforesaid preceding fiscal year. The Treasurer shall then divide the amount so determined by the total number of acres computed as hereinbe-

fore provided, and the result shall be and shall constitute the tax per acre which shall be levied during said subsequent fiscal year on all tracts supplied with water from the southern coast public irrigation system, and which in no other manner are subject to the payment of a tax to meet the cost of the said irrigation system.

"This tax shall be levied and collected by the Treasurer of Puerto Rico at the same time as any other tax imposed by the Public Irrigation Law, and the moneys collected shall be covered into the Insular Treasury to the credit of a special trust fund known as the 'Irrigation Fund', to be invested in the same manner and for the same purposes provided by the Public Irrigation Law and laws amendatory thereof."

In its brief plaintiff calls attention to the fact that the defendant did not present in evidence, as was to be expected, the title of the concessions or water grants made to its predecessors in interest by the Government of Spain, so as to know the exact terms of each concession. The defendant answers that it abides by the acknowledgment made of said concessions or water rights in 1914 by The People of Puerto Rico, through the Commissioner of the Interior, in the contracts attached to the answer, the existence of said rights being furthermore accepted in the stipulation of facts, wherein are specified the amount of water to be received by the various parcels and inasmuch as that is not adverse evidence voluntarily suppressed, the failure to present the said concessions proves nothing against the defendant. It appears that the amount of acre-feet of water per year, stipulated in the contract, was the equivalent in value of the whole grants and concessions that were not waived in favor of The People of Puerto Rico. It is true, as appears from the testimony of Mr. Luchetti, that the defendant is greatly benefited by the irrigation system, as it receives at all times the amount of water stipulated in the contract, but this does not justify the assessment of the special tax, while said contracts are in force and the same have not been

waived, abandoned or delivered, or as long as the water rights granted by the Crown of Spain have not been condemned.

As regards the unconstitutionality of the act in question, the United States Circuit Court of Appeals for the First Circuit held briefly that an act which fixes a special tax on lands that receive water from an irrigation system, is null and void, as it impairs the obligation of the contract with regard to the delivery of an amount of water equivalent to the value of the water rights formerly enjoyed by the owner; and that an act which provides that the Treasurer of Puerto Rico shall take an estimate prepared by the Commissioner of the Interior for determining the rate of a special tax on lands which receive water from the public irrigation system, is null and void as it delegates legislative powers to said Commissioner, 60 Fed. (2d) 10. It is true that the decision on the merits of the case was reversed in so far as the change of venue of the case was concerned, the pronouncements with regard to the unconstitutionality of the act thus remaining without any force or effect, but the reasoning of said decision still has some persuasive force, as held by the Supreme Court of Puerto Rico, in *Russell & Co. v. Domenech, Treasurer*, 48 P.R.R. —. Such is the unanimous opinion of the learned justices of the Circuit Court, which we apply now, as the same has been sustained by the case cited, and specially by that of *People of Puerto Rico v. Russell & Co.*, 268 F. 723, wherefore the validity of the contracts of August 26, 1914 was acknowledged.

After setting forth the above statements, it is unnecessary to consider the question as to whether the action is barred by prescription or not, because it was brought two years and two months after Act No. 302, of the Congress of the United States, approved April 23, 1928, became effective, and said Act simply grants a term of one year. Nevertheless, we will state that if Act No. 49 of the Legislature of Puerto Rico, of July 8, 1921, is valid and constitutional, Act No. 302, *supra*, would be applicable solely to the taxes whose collection have been prevented through an injunction proceeding that was pending on March 4, 1927, when

the act amending Section 48 of the Organic Act was approved, but not to the taxes assessed subsequently, the amended complaint herein claiming taxes for the years 1922-23 to 1933-34, both inclusive.

For the above-stated reasons, the complaint is dismissed, without special pronouncement of costs.

San Juan, Puerto Rico, November 25, 1935.

PABLO BERGA,

District Judge.

[The same title.]

JUDGMENT.

For the reasons stated in the statement of facts and opinion rendered on this date, and attached to the record of this case, as part of this judgment, the court overrules the complaint, without special pronouncement of costs.

San Juan, Puerto Rico, November 25, 1935.

PABLO BERGA,

District Judge.

Attest: J. FIGUEROA, *Clerk.*

[The same title.]

SERVICE OF JUDGMENT.

To the Honorable Attorney General of Puerto Rico, San Juan, Puerto Rico.

The undersigned clerk hereby notifies you that the court of this district has rendered judgment herein, dated November 25, 1935, which was duly recorded in the corresponding registry, as appears in the record of this case, where you may find in detail the terms of said judgment.

And as you are or represent the party aggrieved by said judgment, from which an appeal may be taken, I am addressing you this written notice and have filed a copy thereof, in accordance

with Section 2 of an Act to amend Sections 92, 123, 227 and 229 of the Code of Civil Procedure, approved March 9, 1911.

San Juan, Puerto Rico, November 29, 1935.

J. FIGUEROA,

Clerk of the District Court of San Juan, P. R.

[The same title.]

NOTICE OF APPEAL.

To RAFAEL CASTRO FERNANDEZ, *as attorney for the defendant,*
and to JUAN FIGUEROA, *clerk of this court, civil section:*

Gentlemen: Please take notice that the plaintiff herein, The People of Puerto Rico, feeling aggrieved by the judgment rendered by this Honorable court, on November 25, 1935, and served on this party the 29th of said month and year, appeals from same, in its entirety, to the Honorable Supreme Court of Puerto Rico.

San Juan, Puerto Rico, December 26, 1935.

B. FERNANDEZ GARCIA, *Attorney General,*
by R. CORDOVES ARANA,
Assistant Attorney General.

Copy served this 26th day of December, 1935.)

R. CASTRO FERNANDEZ,
by JOSE LOPEZ BARALT,
Attorney for the Defendant.

[The same title.]

MOTION FOR AN ORDER ADDRESSED TO THE
REPORTING STENOGRAPHER.

Now comes the plaintiff, by the Attorney General of Puerto Rico, and by the Assistant Attorney General, and respectfully states and prays:

1. That the plaintiff feeling aggrieved by the Judgment rendered herein has served and filed on December 26, 1935, with the

Order.

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clerk of this court, a notice of appeal to the Supreme Court of Puerto Rico.

2. That in conformity with Act No. 27 of November 27, 1917, plaintiff wishes to substitute the bill of exceptions and the statement of the case by a transcript of the evidence prepared by the stenographer of this court, wherein all the documentary evidence and the oral testimony of both parties, as well as the objections and exceptions taken and the orders of the court, be made to appear.

Wherefore, plaintiff respectfully prays that an order be entered addressed to the reporting stenographer of this court, commanding him to make a true and exact transcript of the stenographic record of the trial, as set forth in the above paragraph.

San Juan, Puerto Rico, January 3, 1936.

B. FERNANDEZ GARCIA, *Attorney General*,
by R. CORDOVES ARANA,
Assistant Attorney General.

[The same title.]

ORDER.

Considering the motion of the plaintiff requesting a transcript of the evidence in this case, the court sustains the same and orders Juan Morales, the stenographer who took the evidence in this case, to prepare the aforesaid transcript, a term of 20 days, counted from the date this order is served on him, being granted.

Given in San Juan, Puerto Rico, this seventh day of January, 1936.

PABLO BERGA,
District Judge.

Copy served this day of January, 1936.

Stenographer, District Court.

[The same title.]

ORDER.

Let the transcript of evidence of this case be considered as filed, and December 4, 1936, at 9 A.M., is set to hear the parties with regard to the approval of said transcript.

San Juan, P. R., November 27, 1936.

PABLO BERGA,
District Judge.

The parties were notified of the above order, this twenty-seventh day of November, 1936.

J. FIGUEROA, *Clerk.*

[The same title.]

AMENDMENTS TO THE TRANSCRIPT OF THE
EVIDENCE.

Now comes the defendant, by its undersigned attorney, and respectfully prays that the transcript of the evidence presented by the stenographer of this Honorable court, be amended as follows:

1. On page 1, of the transcript, paragraph 2:

"Plaintiff: We beg to inform the court that the parties have subscribed a stipulation of facts in this case, so that the same may substitute whatever evidence may be necessary with regard to the points contained therein, this without prejudice to the right of the plaintiff to present additional evidence in connection with some other point."

"Defendant: Correct."

2. That the stipulation of facts dated August, 1935, and approved by the court, the day of the trial be transcribed in toto.
San Juan, P. R., December 4, 1936.

R. CASTRO FERNANDEZ,
Attorney for the Defendant.

Copy served this fourth day of December, 1936.

B. FERNANDEZ GARCIA,
Attorney for the Plaintiff.

[The same title.]

ORDER.

Considering the petition of the defendant dated December 4, 1936, and as the stipulation of facts of the parties of September 11, 1935, forms part of the evidence, let the reporting stenographer transcribe the aforesaid stipulation. For this purpose the stenographer is granted a term of five days, after which the court shall approve the aforesaid transcript of the evidence.

San Juan, P. R., December 5, 1936.

PABLO BERGA,
District Judge.

Copy of the above order was served this seventh day of December, 1936.

J. FIGUEROA, *Clerk.*

[The same title.]

JUDGE'S APPROVAL OF THE TRANSCRIPT OF THE
EVIDENCE.

I, Pablo Berga, Judge of the District Court for the Judicial District of San Juan, Puerto Rico, do hereby certify:

That I presided over the hearing of this case and that the foregoing transcript of the evidence is a true and exact transcript of the evidence adduced at the trial; and I hereby approve the same for purposes of the appeal taken to the Supreme Court of Puerto Rico from the judgment rendered by this court.

San Juan, Puerto Rico, December 10, 1936.

PABLO BERGA,
District Judge.

[The same title.]

MOTION REQUESTING RECONSIDERATION OF THE
ORDER APPROVING THE TRANSCRIPT OF
THE EVIDENCE AND SUGGESTING
AMENDMENTS THERETO.

To the Honorable PABLO BERGA, Judge:

Now comes the plaintiff, by the Attorney General of Puerto Rico, and by the First Assistant Attorney General, and respectfully state and pray:

1. That the transcript of the evidence in this case was approved by this Honorable court on December 10, 1936.

2. That on beginning the preparation of the transcript of the record in order to perfect the appeal, the Assistant Attorney General to which this case has now been assigned (Mr. Rodriguez Serra, former Assistant Attorney General, was in charge of this case) has noticed that Plaintiff's Exhibits 1, 2 and 3, which consist of plans, have not been included in any manner in the aforesaid transcript of the evidence, and the stenographer who prepared the same has made a remark on pages 37 and 38 which reads: "As a plan is involved, the same can not be copied herein."

3. That plaintiff is of the opinion that the aforesaid exhibits are necessary for a correct interpretation and decision of this case.

Wherefore, plaintiff prays this Honorable court:

1. That an order be entered addressed to the clerk of this court, commanding him to forward to the Supreme Court with the transcript of evidence, Plaintiff's Exhibits 1, 2 and 3.

2. That a new approval be made stating why the original of said Plaintiff's Exhibits 1, 2 and 3 are forwarded.

San Juan, Puerto Rico, December 14, 1936.

B. FERNANDEZ GARCIA, *Attorney General,*

by R. CORDOVES ARANA,

First Assistant Attorney General.

Certificate of Transcript of Record.

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Copy served this fifteenth day of December, 1936.

R. CASTRO FERNANDEZ,
Attorney for the Defendant.

[The same title.]

ORDER.

Considering plaintiff's motion, let the clerk of this court forward to the Supreme Court with the transcript of evidence, Plaintiff's Exhibits 1, 2 and 3, which being plans, cannot be copied in said transcript and the same being necessary to correctly construe and decide this case.

Let the parties be notified.

Given in San Juan, P. R., December 15, 1936.

PABLO BERGA,
District Judge.

Copy served this fifteenth day of December, 1936.

J. FIGUEROA, *Clerk.*

[The same title.]

COUNSEL'S CERTIFICATE OF THE TRANSCRIPT OF
THE RECORD.

We, R. Cordoves Arana, one of the attorneys for the plaintiff, and R. Castro Fernandez, attorney for the defendant, hereby certify:

That the foregoing judgment roll is a true and exact copy of the pleadings, orders, resolutions, opinion and judgment, service of judgment, and notice of appeal filed in the office of the clerk of the District Court for the Judicial District of San Juan, Civil Section, in the above-entitled case; that the attached transcript of evidence and Plaintiff's Exhibits 1, 2 and 3, the originals of which are attached as they consist of plans which cannot be copied, together with this judgment roll constitute the transcript of the record on appeal. And in order that the plaintiff may

perfect the appeal it has taken to the Supreme Court, we sign these presents, in San Juan, Puerto Rico, this twenty-seventh day of January, 1937.

R. CORDOVES ARANA,

One of the Attorneys for the Plaintiff.

R. CASTRO FERNANDEZ,

Attorney for the Defendant.

Copy of the above judgment roll, received this twenty-seventh day of January, 1937.

R. CASTRO FERNANDEZ,

Attorney for the Defendant.

[Title omitted.]

TRANSCRIPT OF THE EVIDENCE.

[Filed in the Supreme Court of Puerto Rico February 8, 1937.]

This case was called for trial on September 11, 1935, before the Honorable Pablo Berga. Plaintiff appeared by Mr. Rodriguez Serra, First Assistant Attorney General of Puerto Rico, and defendant by Mr. Rafael Castro Fernandez. Both parties informed the court that they were ready.

Plaintiff: I wish to call the attention of the court to the description of the properties, that is something about which there is no controversy. The description made in the complaint has been accepted by the defendant in its answer, so that the description of the properties, as the same appears in the complaint, has been accepted.

Defendant: That is all right.

Judge: The stipulation is accepted.

[The same title.]

STIPULATION OF FACTS.

Now come the parties by their undersigned attorneys and in order to avoid the production of evidence in this case, as well as for the appeal that in due course may be taken from any order, decision or judgment rendered herein, they stipulate and agree to accept as facts the following:

1. That plaintiff, The People of Puerto Rico, is a sovereign political entity created by an Act of the Congress of the United States of March 2, 1917, generally known as "Organic Act of Puerto Rico"; and that Manuel V. Domenech, was at the time this action was brought, Treasurer of Puerto Rico, duly appointed and in the possession of his office in accordance with the law, the Treasurer of Puerto Rico being at present the Honorable Rafael Sancho Bonet, who is acting as such.

2. That the defendant Russell & Co. Sucrs., S. en C., is an agricultural civil partnership, organized as a legal entity in conformity with the Civil Code of Puerto Rico, with power to sue and be sued, and that said partnership is constituted by the following persons, who organized the same with the object of engaging in the cultivation of sugar cane, to wit: Frank A. Dillingham, a citizen of the United States and resident of the State of New Jersey; Horace Havemeyer, a citizen of the United States and resident of the State of New York; Edward S. Paine, a citizen of the United States and resident of the State of New York; Edwin L. Arnold, a citizen of the United States and resident of the State of Florida; Frank M. Welty, a citizen of the United States and resident of the State of Ohio; and H. B. Orde, a citizen of Great Britain and resident of the Dominion of Canada.

3. That the defendant partnership is and has been since the year 1921 absolute and full owner of the rural properties known as Fortuna, Cristina, Luciana and Serrano estates, described in paragraph 3 of the amended complaint, properties numbers 295,

379, 403 and 309, respectively, and is at present in possession of same.

4. That Fortuna estates, predecessor in title of the defendant, was on August 26, 1914, and the defendant is at present, owner, by virtue of certain concessions and royal decrees of the Spanish Crown, or uses and prescriptions, of certain water rights in favor of said lands or estates, said water to be used in the irrigation of the aforesaid properties and the water to be taken from the Jacaguas, a non-navigable river flowing into the Caribbean Sea, the water rights corresponding to said lands or estates, being described as follows:

"1. For property known as Fortuna estate, comprising approximately 312.07 hectares of land, with an appurtenant right to take from the River Jacaguas, for the irrigation thereof, 139.75 liters of water per second, equivalent to 3,572.910 acre-feet of water per year for said Fortuna estate.

"2. For property known as Cristina estate, comprising approximately 308.14 hectares of land, with an appurtenant right to take from the River Jacaguas, for the irrigation thereof, 106.74 liters of water per second, equivalent to 2,728.969 acre-feet of water per year for said Cristina estate.

"3. For property known as Luciana estate, comprising approximately 243.58 hectares of land, with an appurtenant right to take from the Jacaguas River, for the irrigation thereof, 82.54 liters of water per second, equivalent to 2,111.142 acre-feet of water per year for said Luciana estate.

"4. For property known as Serrano estate, comprising approximately 219.13 hectares of land, with an appurtenant right to take from the River Jacaguas, for the irrigation thereof, 102.47 liters of water per second, equivalent to 2,619.769 acre-feet of water per year for said Serrano estate."

(The equivalent measures above specified were determined in the contract attached to the answer, as Exhibit A.)

5. That the aforesaid Fortuna estates and its predecessor in

title, had been taking and using for over twenty years prior to August 26, 1914, whenever it was physically possible to do so, water from the Jacaguas river for the irrigation of said properties, in conformity with the aforesaid concessions, royal decrees or uses and prescriptions, up to the amounts specified in the preceding paragraph, when obtainable from the river, independent from and excluding torrential water, said water having been taken from the river bed through intakes constructed for that purpose by the predecessors in title of the defendant.

6. That the aforesaid Fortuna estates, predecessor in title of the defendant, was on August 26, 1914, and the defendant is at present, owner, by virtue of certain concessions and royal decrees of the Spanish Crown, or uses and prescriptions, of the right to take and use for irrigating one or more of the aforementioned properties, the torrential water of the above Jacaguas river; and that the aforesaid Fortuna estates, and its predecessor in title for over twenty years prior to August 26, 1914, took and used for the irrigation of said properties torrential waters from the bed of the Jacaguas river in times of flood, without limitation whatsoever as to the amount of water obtainable from the river, with the exception of the limitation fixed by the size and situation of the torrential intakes and of the canals leading from the intakes, to the aforesaid properties, under the authority and by virtue of said concessions, royal decrees, uses and prescriptions.

7. That The People of Puerto Rico authorized and constructed a public irrigation system by virtue of the public irrigation act approved September 18, 1908, as the same has been amended; and that as part of the construction of said irrigation system it has built a dam to store and accumulate part of the waters of the Jacaguas river, which dam is known as Guayabal Dam; extends across the bed of the Jacaguas river, and is situated above the intakes that the predecessor in title of the defendant used for taking and using water for the irrigation of the aforesaid properties, as well as for the irrigation of Unión and Placeres estates, to be hereinafter mentioned.

8. That prior to the 26th of August, 1914, The People of Puerto Rico through its Commissioner of the Interior and in conformity with the provisions of the aforesaid public irrigation act, requested from the predecessor in title of the defendant, to waive, abandon and hand their right to take and use, both the ordinary and the torrential water from the Jacaguas river for irrigation purposes, acquired by virtue of said concessions, royal decrees or uses and prescriptions in favor of the four parcels above specified and known as Fortuna, Cristina, Luciana and Serrano estates, and that said predecessor refused to waive, abandon or hand the aforesaid rights.

9. That Fortuna estates, nearest predecessor in title of the defendant, signed on August 26, 1914, a contract with Ernest S. Wheeler, the then Assistant Commissioner of the Interior, who at the time acted as Commissioner of the Interior of Puerto Rico and discharged duties as such, and who then acted in behalf of The People of Puerto Rico. Said contract was drawn into a public deed and protocolled on June 8, 1915, by the aforesaid Fortuna estates and Manuel V. Domenech, the Commissioner of the Interior at the time, copy of said contract having been attached to the answer presented to the amended complaint herein, as Exhibit A. This exhibit is added by reference to this stipulation.

10. That in the year 1917, Fortuna Estates sold, ceded and transferred to the defendant, the four properties described in paragraph 3 of the amended complaint, that is, Cristina, Fortuna, Luciana and Serrano estates, with the rights, benefits and privileges acquired by said properties under the concessions, royal decrees or uses and prescriptions specified in paragraphs, 3, 4, 5 and 6 of this stipulation, or acquired in some other manner, as well as all right, title and interest in the contract marked "Exhibit A" to which reference has been made above, and also of all the water to which they were entitled under the terms of said contract.

11. That Jose A. Poventud, Sergio Torruella Cortada and his

of J. Serralles are, and their predecessors in title were, at all times subsequent to the year 1921, absolute and full owners of two parcels of land situated in the municipality of Juana Diaz, P. R., known as Union and Placeres estates, described under paragraph III of the amended complaint as property No. 413, and through the defendant as sublessee thereof, are and have at all times been in possession of said properties.

12. That Jose A. Poventud, Sergio Torruella Cortada and the predecessors in title of heirs of J. Serralles, were on August 26, 1914, and the aforesaid Jose A. Poventud, Sergio Torruella Cortada and heirs of J. Serralles, are at present, by virtue of certain concessions and royal decrees of the Spanish Crown, or uses and prescriptions, owners of certain concessions entitling them to take from the Jacaguas river water for the irrigation of said parcels, the Jacaguas being a non-navigable river flowing into the Caribbean Sea. Said parcels and their corresponding water rights are described as follows:

"1. Piece of property known as Union Estate, comprising approximately 150.14 hectares of land, with an appurtenant right to take from the River Jacaguas for the irrigation thereof, 39.60 liters of water per second, equivalent to 1,015.56 acre-feet of water per year for said farm.

"2. Piece of property known as Placeres Estate, comprising approximately 240.54 hectares of land, with an appurtenant right to take from the River Jacaguas, for the irrigation thereof, 22 liters of water per second, equivalent to 565.75 acre-feet of water per year for said farm."

(The equivalent measures specified above were determined in the contract attached to the answer as Exhibit B.)

13. That prior to the year 1914, the owners at the time of said two parcels of land leased them for a number of years to the predecessors in title of the defendant, and as an incident to said lease, they ceded to the predecessors in title of the defendant, all the rights acquired under the aforesaid concessions, royal decrees,

uses and prescriptions, or contract, to take water for the irrigation of said lands; that under the terms of said lease the lessee, that is the defendant, is bound to pay all sort of taxes assessed on said lands.

14. That the owners of the aforesaid two parcels and their predecessors in interest, as well as the predecessors in title of the defendant, as lessees, have been for over 20 years prior to August 26, 1914, taking and using whenever that was materially possible, the waters obtainable from the Jacaguas river for the irrigation of said parcels, by virtue of the above concessions, royal decrees, uses and prescriptions.

15. That the aforesaid Jose A. Poventud, Sergio Torruellas Cortada and the predecessors in title of heirs of J. Serralles, were on August 26, 1914, and the above Jose A. Poventud, Sergio Torruella Cortada, and heirs of J. Serralles, are at present owners, by virtue of certain concessions, royal decrees or uses and prescriptions, of the right to take and use torrential waters from the Jacaguas river for the irrigation of the aforesaid Union and Placeres Estates; and that the said Jose A. Poventud, and Sergio Torruella Cortada, and the predecessors in title of the heirs of J. Serralles, through the defendant and the predecessors in title of the latter as lessees for over 20 years prior to August 26, 1914, have been taking and using for the irrigation of said estates, torrential waters from the bed of the Jacaguas river at times of floods, without limitation as to the amount of water available in the river and with the sole limitation imposed by the size and the situation of the torrential intakes and of the canals leading from the intakes to the respective parcels, all of this in conformity with the aforesaid concessions, royal decrees, or uses and prescriptions.

16. That prior to the 26th of August, 1914, The People of Puerto Rico, through its then Commissioner of the Interior and in accordance with the provisions of the aforesaid public irrigation act, invited the predecessors in interest of the said Jose A. Poventud, Sergio Torruella Cortada and heirs of J. Serralles, as

well as the predecessor in title of the defendant, as lessees, to waive and abandon their respective rights to take and use from the Jacaguas river, both ordinary and torrential water for the irrigation of the two aforesaid parcels known as Union and Placeres estates, by virtue of said concessions, royal decrees or uses and prescriptions, with the object of determining the amount of water to be supplied by the Insular Irrigation System, as an equivalent, but they all refused to waive, abandon or deliver said rights.

17. That the aforesaid José A. Poventud and Isabel Cortada, widow of Poventud, Juan Torruella Cortada and Sergio Torruella Cortada, predecessors in title of the present owner, and the lessee Fortuna estates, predecessor in title of the defendant, as lessee, on or about the 26th of August, 1914, signed a contract with Ernest A. Wheeler, the then Assistant Commissioner of the Interior of Puerto Rico, acting as Commissioner of the Interior and discharging the duties of said office, in behalf of The People of Puerto Rico, copy of which contract was attached to the answer filed to the amended complaint herein, as Exhibit B; this contract is incorporated by reference to this stipulation.

18. That subsequently thereto, that is, in the year 1917, Fortuna estates, as lessee of the aforesaid Union and Placeres estates, with all the water rights corresponding to said parcels, or as owner thereof, and being lessee of same for a number of years, sold, ceded and transferred to the defendant the lease it had of said Union and Placeres estates above mentioned, with all the rights, benefits, privileges and obligations that it or its lessors might have in conformity with the concessions specified in paragraphs 12 and 14 of this stipulation, or otherwise, as well as all rights and obligations under the contract above described, and all the waters to which the said lessors might be entitled by virtue of its provisions.

19. That the officers of the Government of Puerto Rico entrusted with the performance of said contracts of August 26, 1914, have performed them in their entirety, and the aforesaid

parcels generally known as Fortuna, Cristina, Luciana and Serano, and Union and Placeres estates, have received since the year 1915, and are receiving at present water for their irrigation, from the public irrigation system of the southern coast, in conformity with and under the terms of said contracts of August 26, 1914, attached to the answer filed to the amended complaint, and marked as "Exhibits A" and "B", but neither the defendant herein nor the parcels above-described, have received during said time or at any other time, or are receiving at present, from the public irrigation system of the south coast, a larger amount of water than that which the defendant, its lessors, and said parcels would be entitled to receive by virtue and under the terms of the contracts of August 26, 1914, above described.

20. That the aforesaid parcels have not been and are not at present subject to the payment of the irrigation tax levied in conformity with the provisions of an Act approved by the Legislature of Puerto Rico on September 18, 1908; entitled "An Act to provide for the construction of an irrigation system, and to provide revenues therefor; for the temporary appropriation of \$200,000 to begin such work, and for other purposes," as amended; but the aforesaid properties are subject to the payment of all other taxes on real property assessed by the People of Puerto Rico for insular or municipal properties, and all taxes levied from and after the year 1921, to the present having been paid every year at the same tax rate paid by other properties, whether the latter are within the public irrigation district of the southern coast created by the irrigation act or without, or whether the owners of said properties waived their concessions to obtain water for irrigation purposes or not.

21. That the first session of the 10th Legislature of Puerto Rico approved an act entitled "An Act fixing a tax on certain lands using water from the southern coast public irrigation system, on which lands no tax whatsoever was levied under the public irrigation law, and for other purposes", which act was approved by the Governor of Puerto Rico on July 8, 1921, and

became effective 90 days later. This act is generally known as "Act No. 49 of the year 1921".

22. That in accordance with the provisions of said Act 49 of 1921, the Treasurer of Puerto Rico has assessed and levied on the aforesaid parcels of land Nos. 295, 379, 403, 309 and 413, as special tax for the fiscal years 1922-23 to 1933-34, both inclusive, the sum of \$70,332.76, which has not been paid; and that for the recovery of said tax the Treasurer of Puerto Rico has filed the present suit, the defendant partnership being bound to pay to the plaintiff the aforesaid tax if Act No. 49 of 1921 is legal and valid; that besides the aforesaid taxes assessed by the Treasurer of Puerto Rico, the latter has demanded from the defendant, and the present action is brought to recover same, the additional sum of \$27,336.12 as surcharges due by the defendant on said unpaid taxes; that said \$27,336.12 is a correct and true computation of the surcharges that the defendant would be owing on said taxes up to the date of filing of the amended complaint, provided said taxes are valid and legal and provided also that said surcharges may be collected on taxes assessed by virtue of Act No. 49 of 1921, and remaining unpaid.

23. That the defendant in case No. 1250, entitled Horace Havemeyer et al., plaintiffs, v. Juan G. Gallardo, Treasurer of Puerto Rico, defendant, presented before the District Court of the United States for the District of Puerto Rico, obtained after a trial on the merits of the case, a final decree granting a writ of injunction prohibiting the assessment and collection from the defendant herein or on the above-described properties, of any tax, in conformity with the aforesaid Act No. 49 of 1921, approved July 8, 1921; that said final decree was appealed to the United States Circuit Court of Appeals for the First Circuit, and was pending before the said Circuit on March 4, 1927, and the same was abated and the injunction dissolved by virtue of the provisions of an Act of Congress of the United States, approved on March 4, 1927, entitled "An Act to amend and re-enact sections 3, 20, 31, 33, 38, and 48 of the Act of March 2, 1917, entitled

'An Act to provide a civil government for Porto Rico, and for other purposes, as amended by an Act approved June 7, 1924, and for the insertion of a new section in said Act between sections 5 and 6 of said Act, to be designated as '5a' of said Act." (Section 48 of the Organic Act as amended on March 4, 1927.)

24. It is expressly covenanted that this stipulation, as to the veracity of the facts stated under paragraphs 4 to 18 inclusive, shall not be considered or construed as an admission on the part of the plaintiff herein in the sense that the same are pertinent and irrelevant to the determination of the questions at issue herein.

San Juan, Puerto Rico, September 11, 1935.

B. FERNANDEZ GARCIA,

M. RODRIGUEZ SERRA,

Attorney General,

Attorney for the Plaintiff.

R. CASTRO FERNANDEZ,

Attorney for the Defendant.

Evidence for the Plaintiff.

Plaintiff: We offer in evidence a plan of the irrigation system, with a certificate from the Commissioner of the Interior and from the chief engineer of the irrigation system, showing that this is a copy of the original map drawn from the irrigation system of Puerto Rico, by the United States Geological Survey of the irrigable lands of the southern coast, extending from Ponce to Patillas.

Defendant: No objection.

Judge: Admitted. Plaintiff's Exhibit 1.

SWORN TESTIMONY OF ANTONIO LUCHETTI.

Q. 1 (by Plaintiff). Please state your name. A. Antonio Luchetti.

Q. 2. Profession? A. Engineer.

Q. 3. Do you hold a public office? A. Chief engineer of the irrigation system for the southern coast of Puerto Rico.

Q. 4. Since when? A. Since May 1, 1923.

Q. 5. And before then? A. Before that date, I held several offices in the irrigation system. My first position was as operator to the assistant engineer, in July, 1910; while the work was in process of construction—

Q. 6. Construction of what? A. Of the irrigation system.

Q. 7. In that capacity and by virtue of the offices that you have held since 1910, have you personal knowledge of the construction and operation of the Guayabal dam? A. Yes, sir.

Q. 8. Do you know how the system operates and the amount of water ordinarily flowing from the years 1910 to 1914? A. Yes, sir.

Q. 9. Besides the data appearing in the files of the irrigation system with regard to the flow of water from the Jacaguas river during those four years, did you have any opportunity to write a memorandum or report addressed to some public officer of Puerto Rico containing technical data? A. On November 12, 1925, I prepared a report for the Assistant Attorney General, Mr. Lopez Acosta, while he was in charge of this case before the Federal court. This memorandum contains a description quite complete of the situation prior to the establishment of the irrigation system and its capacity. It contains data on the hydrography of the Jacaguas river, that is during those four years, from the year 1910 to 1914, both inclusive, and also contains data as to the amount of water delivered to Fortuna estates by the irrigation system after the same was constructed, after its operation was begun, and a comparison based on official records with regard to the water that the grantees might enjoy and those actually delivered, that is, the water received prior to the date in which the operation of the irrigation system was begun and those delivered 4½ years after the operation of the system began.

Plaintiff: To save time we might stipulate that this memorandum or report be presented to the court. If counsel for the opposite party wishes to read it, a 5 or 10-minute recess may be declared by the court.

Defendant: I wish to ask a question. Mr. Luchetti, does this report contain—

Plaintiff: I think that all opinions, as to something which is not a fact should be discarded; the personal opinion of Mr. Luchetti, on things which are not purely technical or observations made by him in his official capacity.

Defendant: All right, accepted.

Q. 10 (by Defendant). Does this report show anywhere that Russell & Co. has received a quantity of water greater than that which it was entitled to receive by virtue of the contract entered into with the Commissioner of the Interior, and marked "Plaintiff's Exhibit A"? A. According to law and in conformity with the obligations contracted by us, we cannot and should not deliver any amount of water in excess of the maximum fixed by the contract. It may be noticed that the report or memorandum clearly states that they received a quantity of water much greater than that they would have received during the $4\frac{1}{2}$ years immediately preceding the establishment of the irrigation system, had they depended on the prior flow of water.

Q. 11. But did they ever receive a quantity of water in excess of that which they were entitled to receive by virtue of the contract executed with The People of Puerto Rico? A. By virtue of the contract they did not receive a drop of water in excess of the amount stipulated.

Q. 12 (by Plaintiff). As chief engineer, have you any knowledge of the zone where the work was done, prior to the establishment of the irrigation system? A. I knew that zone perfectly well as I was brought up there, I spent my childhood in that neighborhood and knew perfectly well the climate in that section of the island.

Q. 13. Limiting ourselves to that knowledge. Were the rains on the banks of the Jacaguás river abundant and frequent or were there long periods of drought? A. There were droughts the same as today, lengthy ones and there were short periods of heavy and abundant rains which caused great floods, as happens today; but

the stream or flood was of little use for irrigation purposes. It was more destructive than beneficial to that zone and when irrigation was really needed, water was lacking, during the dry season, that is to say from December till May, which is the period when water for irrigation was needed. There was no water in the river during that period.

Q. 14. Do you mean to say that it is a fact that the southern part of the island is subject to lengthy droughts? A. Yes, sir.

Q. 15. And that this condition existed prior to the construction of the irrigation system? A. That is why the construction of a general irrigation system was begun, in order to utilize the greatest amount of water possible in the southern coast.

Q. 16. Did the grantees of the Jacaguas river receive the total amount of water to which they were entitled under the concession?

Defendant: I object, as immaterial and irrelevant. The concessions are subject to the contract entered into with The People of Puerto Rico. I mean to say that the concessions exist no longer, what we have today is the contract and the contract entitles them to receive a certain amount of water. Hence I think that everything referring to the condition existing at the time the concessions were in force is immaterial and irrelevant. By virtue of the contract we are entitled to determine the amount of water and we have not received a single drop in excess, as Mr. Luchetti has testified.

Plaintiff: The object is to show the benefits derived by virtue of the contract. These benefits have been denied in the answer.

Judge: The court admits the evidence.

Defendant: Exception. To avoid making an objection every time the witness testifies, we object to this set of questions, to all the evidence which tends to show that we have received benefits under the contracts.

A. Prior to that?

Q. 17. Prior to the construction of the dam. A. Prior to the construction of the irrigation system the concessions were subject to the eventualities of time. When there was water in the

Jacaguas river they took what they could up to the limit fixed by the concession. When there was no water in the river they had to content themselves with the amount of water they could receive under the terms of the concession, following the turns they had fixed in the distribution chart of the Jacaguas river, beginning with the oldest concessions.

Plaintiff [question addressed to the defendant]: Does that chart appear in the answer to the complaint as an exhibit?

Defendant: Yes, sir.

Q. 18. You may refer to same. A. According to the records, during the $4\frac{1}{2}$ years prior to the establishment of the irrigation system they did not receive the total amount of water which they were entitled to receive, because there was not enough water in the river.

Q. 19. Have you at hand the chart drawn as a definite one? I am referring to the statistical data showing the amount of water flowing through the river during the four years immediately preceding the construction of the system. A. According to the records of the irrigation system—

Q. 20. Were said records in your custody, Mr. Luchetti? A. They are in the files of the irrigation system. The total of acre-feet delivered by the public irrigation system of the southern coast to Fortuna, Serrano, Union, Amelia, Luciana, Cristina and Placeres estates, during the $4\frac{1}{2}$ years—January 1, 1915 to June 30, 1919—were 59,974.68 acre-feet. That was after the irrigation system was established. The total amount of water received by said properties under the Spanish concessions, during $4\frac{1}{2}$ years—January 1, 1910 to June 30, 1914—were 50,382.16 acre-feet; hence, said properties received 9,592.52 acre-feet more under the present irrigation system, during the period specified, than during a similar period immediately preceding the establishment of the irrigation system, that is, 19 per cent more in benefits in so far as the amount of water is concerned. I may add, if allowed to do so, that there was a benefit not only in the amount of water but also in the form in which the water was received. It is plain and

evident that supplying water in the amount and at the time needed is of great benefit to the landowner. The irrigation system with its dams stores the water of the floods and allows the landowner to receive daily the amount of water necessary for the cultivation of its crops. The system irrigates and transports the fertilizer. It keeps on irrigating while the plant is growing and developing. With all these elements or factors, the landowner may prepare his land beforehand, following whatever order may be necessary in order to be as successful as possible or to get the best possible crop. This is an immense benefit not only because the landowner knows the amount of water which he has; but also because he has at his disposal the irrigation system. Before that when rains were scant the streams oftentimes were of no use to the grantees, as small showers falling on the river banks were absorbed by the land without the river receiving any water, besides the fact that the torrential rains that fell during the rainy season benefited the grantees very little as the water swiftly ran down to the sea. Under the new system the water is preserved or stored for the benefit of the landowner.

Q. 21. Did Mr. Luchetti refer specially to the 4½ years immediately following the day of the contract? A. Just to make a comparison.

Q. 22. I may ask Mr. Luchetti now whether there have been some benefits or not, and if so of what nature after the first four years, that is the years following the establishment of the irrigation system of the southern coast? A. Let me submit a plan of the Toro Negro Project, showing how the Guayabal dam has developed.

Q. 23. Is that a public document? A. Yes, sir, a duplicate of official reports.

Plaintiff: I offer it in evidence in connection with the testimony of Mr. Luchetti.

Defendant: I object as irrelevant and immaterial to the case.

A. There are also some maps showing the places.

Q. 24. Is this also a duplicate document? A. A duplicate. There are two maps of each kind.

Judge: Admitted in connection with the testimony of the witness (Exhibit 2).

Defendant: We take exception.

A. After the irrigation system was begun, the water delivered increased 19 per cent over the amount delivered during the 41 $\frac{1}{2}$ years which preceded the establishment of the irrigation system. Owing to the improvements that are being made by the insular government on the river beds—not by nature but by man at the expense of the Insular Government—the benefits in the amounts of water delivered during the last four years, that is until June 30, 1935, increased to 40.11 per cent. This is due to the greater and continuous flow that the irrigation system has at present, which has diminished in the last four years by virtue of the additional work done by the Insular Government. I must state that according to the contracts and concessions under which the irrigation system makes deliveries to Fortuna estates (I mention the concessions because they are still in force and because they compelled us to deliver water to the properties mentioned in this case) no other source of supply is taken into consideration except the Jacaguas river. What I have stated, as I understand it, is that the concessions originated solely and exclusively in the river bed, without taking into consideration the improvements made by man. I could add that I have mentioned the concessions because we are operating according to the concessions. The contracts are followed only when there is enough water in the dam. When the dam has no water the concessions apply.

Q. 25. Does Mr. Luchetti remember of any occasion when there was no water at the dam? A. I could cite several instances. Before the year 1930 and almost every year, the lake dried and we operated according to the concessions. The ordinary flow of the Jacaguas river is allowed to run downstream with the object of supplying the concessions. So that the contracts are not subject entirely to the concessions.

Q. 26. Please continue to state the additional benefits received by virtue of the new development of the irrigation system. A. The irrigation system includes first the ordinary water of the Toro Negro river. This water is carried to the bed of the Jacaguas river through a tunnel situated beneath the dividing line of Juana Diaz and Ciales. This water ran from the tunnel of the Toro Negro river to the Achiote creek, which is an affluent of the Jacaguas river, and from there it flooded to Guayabal Dam. Although the contract specifically stipulates that the grantees are not entitled to them, there are occasions in which the grantees have been benefited by the waters of the Toro Negro river, as it was physically impossible to separate them at the lake.

Q. 27. What other conditions there have been [sic]? A. From and after the year 1928 the Government of Puerto Rico, in accordance with the provisions of an act to develop the water resources, approved first in the year 1925 and upheld by the Circuit Court of Boston in its entirety, and amended in 1927, with the object of giving a greater intervention to the Government in the development of the natural irrigation sources of the island, the Insular Government has been engaged in a project known as the Toro Negro river project. It consists in the construction of dams in the Toro Negro and Matrullas river, with the object of storing the waters of floods that formerly went to the Matrullas river. Guineo dam was constructed at the bed of the Toro Negro river, and the water stored was carried through Toro Negro plant to Guayabal dam, at the level of the tunnel of the Toro Negro river. The irrigation plan was enlarged and Matrullas lake was constructed by carrying the water again from the said Toro Negro tunnel to Guayabal lake.

Q. 28. In order to be plainer it would be convenient for you to explain to the court the route followed by Guayabal, where it is situated? A. The Guayabal lake is situated about five kilometers north of the town of Juana Diaz and it holds through a dam which was constructed, all the water of the Jacaguas river. That is to say, the water from the floods of the Jacaguas river

are stored there. Prior to the year 1928-29, that lake only contained the water that fell on the banks of the Jacaguas river and those which could be used from the Toro Negro river. Under the new project the water of the Toro Negro river and the water of lake Matrullas are stored in that same lake. I mean to say that the floods that formerly were lost in the sea are utilized at present and are used to supply the Guayabal lake. The 40 per cent benefit now received by these grantees is due to the development of the water source, caused by the new plan established by the Insular Government. For example before the year 1930, these concessions and this contract, almost every year suffered from a scarcity of water at the Guayabal lake, by reason of the small amount of water stored at the Guayabal dam. During the last four years the Guayabal dam has always had enough water to make deliveries in due time, daily, as there has always been plenty of water in the Jacaguas river.

Plaintiff: In connection with the testimony of Mr. Luchetti I would like to offer in evidence certain documents which form part of the report to which I referred some time ago. These documents are—one of them has been mentioned in the answer—the distribution plan of the waters of the Jacaguas river according to the old concessions and the other document is a graph showing the situation, as regards the water received by those concessions during 4½ years. This graph is based on the daily records of the irrigation system in 1910. Mr. Luchetti may identify these documents as well as the graphs and once identified as official documents; under his custody, we offer them in evidence.

Q. 29. Please explain this to the court. This document marked "Exhibit A-1", which forms part of the memorandum submitted by you in November, 1925— A. I shall begin with Exhibit A-1. This exhibit shows the various conditions of the water of the Jacaguas river, the order of priority that is the turns which do not appear on the definite distribution plan, the concessions in acre-feet per second and the increase in volume needed in the Jacaguas river in order to be able to supply them according to

their order of priority. That with the object of explaining the graphs, the Jacaguas river needed continuously a volume of 4.08 cubic feet per second in order to supply the grantees up to the limit fixed by the concessions enjoyed by each property. When the volume of the Jacaguas river was less than that, deliveries had to be made by turns.

Q. 30. According to your knowledge and the records, did the Jacaguas river normally have that amount of water? A. No, sir. The hydrographic charts show that it did not have that volume. The graphs show the volume of water obtainable from the Jacaguas river during the 4½ years immediately preceding the enlargement of the irrigation system. The horizontal lines indicate the amount of the concession and it may be seen in a graphical manner to what extent there was water available at the Jacaguas river to supply the concessions.

Plaintiff: We offer them in evidence, as part of the report that we had already offered, subject to the same exception.

Defendant: May I ask a question?

Judge: You may.

X-Q. 31 (by Defendant). Does this document Exhibit A-1 refer to all the properties that enjoy concessions? A. From the Jacaguas river.

X-Q. 32. Does it not refer to the properties of Russell & Co.? A. Necessarily according to the order of the turns, for it is well-known that the concessions were not bound to receive the water according to the turns. Nothing has modified that. The contracts cannot alter that.

X-Q. 33. Does that refer to the 13 parcels? A. To all of the parcels among which you have Fortuna, Placeres and Amelia estates. All the contracts were jointly considered by the Commissioner of the Interior.

Defendant: I object to the admission of this evidence as absolutely immaterial and irrelevant. As regards the fact that this report of November 12, 1925, is a true and exact copy of the

one submitted by him, we admit that but we do not accept its relevancy.

Plaintiff: That is subject to the same objection he had presented. We also offer this other document in connection with his testimony. That will be all.

X-Q. 33a (by Defendant). Mr. Luchetti, you have stated that during the years 1910 to 1914, the concessions received 19 per cent more water— A. Less water.

X-Q. 34. From 1915 to 1919 they received 19 per cent more water than during the same length of time, that is than during the $4\frac{1}{2}$ years elapsing between 1910 to 1914? A. Yes, sir.

X-Q. 35. When you speak of the concessions, do you refer to all the concessions of the Jacaguas river, that is to 13 concessions according to Exhibit A-1, or simply to our concessions? A. To the concessions of Russell & Co., but in the former chart appeared Fortuna estate, as well as Union, Placeres and Amelia estates of Russell & Co.

X-Q. 36. Amelia estate is not in controversy herein. A. But it was included at that time.

X-Q. 37. Does that simply refer to our concessions? A. To yourselves. I must state that the aforesaid 19 per cent affects each and every one of the parcels included, as every one of them was subject to the same turn and received water during the former $4\frac{1}{2}$ years. So that the aforesaid percentage affects all of the parcels collectively the same as everyone of them individually.

X-Q. 38. In spite of having received 19 per cent more benefits, did Russell & Co. receive a single drop of water in excess of the amount that it was entitled to receive? A. It did not receive a single drop of water in excess of the amount stipulated in the contract.

X-Q. 39. And the same situation prevailed during the last four years ending in 1935, when according to your testimony, said properties received a benefit of 40.10 per cent? A. Yes, sir.

X-Q. 40. But in spite of receiving a benefit of 40.10 per cent they did not receive a single drop of water in excess of the amount.

which they were entitled to receive according to the concessions and the contracts?

Plaintiff: I object as that is a question of law that has not been decided. We mean the amount of water that they were entitled to receive. To avoid that difficulty I would suggest that counsel for the opposite party used the word "maximum".

X-Q. 41. The maximum amount of water which they were entitled to receive according to the concessions and under the contract. A. They received a much greater amount of water.

X-Q. 42. And the amount received in excess of the concessions was in excess of the limits of the concession? A. Of the limits of the concession.

X-Q. 43. Please state the amount. My question is based on the limit that you were entitled to receive. A. If there had been enough water available. The difference in percentage during the last years is due to the fact that a much greater amount of torrential water—mentioned also in the concessions and in the contracts—could not be used for a much longer period than before. Formerly floods lasted from 3 to 4 hours. Now, owing to the dams, when there is a flood, the rain falls and exceeds the limit. If the excess is not stored it lasts several days and thus the concessions formerly enjoyed those floods for a longer period of time. That by itself is an immense benefit, obtained by reason of the work we have done.

X-Q. 44. Then, putting it in other words. During the last four years Russell & Co., in accordance with your testimony, has received 100 per cent of the water to which it was entitled under the concession, and that 100 per cent is more than what it previously received? A. It is more under the terms of the franchise, as formerly there was not enough water available.

X-Q. 45. Have they ever received more than 100 per cent? A. More than 100 per cent would have exceeded the terms of the contract.

X-Q. 46. You have spoken of the benefits received by Russell & Co. under the irrigation system, on account of the irrigation

system, of the construction of the dam and of the improvements made in the water of the Toro Negro river which passed from the lake to the Guayabal dam. Is it not true that The People of Puerto Rico has also received some benefits with the irrigation system and that when it is said The People of Puerto Rico, it is meant not only the Government but also the landowners and taxpayers who have no concessions and which at present enjoy the benefit of the irrigation of their lands?

Plaintiff: I admit that that benefits the island in general, but whoever enjoys that benefit has to pay.

X-Q. 47. Before the construction of the irrigation system is it not a fact that the waters of the Jacaguas river were not enough to supply the concessions? A. Yes, sir.

X-Q. 48. If they were not enough to supply the concessions, they could not of course be enough to supply any private property? A. Not the ordinary waters.

X-Q. 49. Then it became necessary to construct the dam? A. To utilize the waters from the floods.

X-Q. 50. With what object,—with the object of giving them to other lands and to irrigate other lands that did not have concessions? A. Yes, sir.

X-Q. 51. Then the benefits of The People of Puerto Rico through the construction of the irrigation system are received by supplying water for irrigation purposes to other persons and to other taxpayers which did not have concessions during the Spanish times? A. Yes, sir.

X-Q. 52. Then, in accordance with your testimony, there were times when in spite of the dam there was not enough water to supply the lands which did not have concessions? A. The waters of Guayabal lake, which was constructed primarily with the object of delivering water to the new irrigation system when it became scarce, as provided by law, are reduced in proportion to each acre of land included in the district and in accordance with the amount of water available in the dam. However, the contracts under which delivery is made to the concessions of Fortuna estates and

others, from the Jacaguas river, stipulate a constant daily supply, so that under the circumstances, when waters are scant in that lake the landowners who pay a tax to defray the cost of construction and operation of the system have to suffer; they suffer because they only receive part of the water. This is done with the object of having water for as long a period of time as possible so as not to lack water at any time during drought seasons. Estates enjoying concessions receive the benefit of the water of which the landowners are deprived, as such estates keep on receiving the total amount to which they are entitled as long as the drought lasts. So they have a greater benefit than those who paid for the work. Very often neither the landowners nor the estates enjoying concessions received any water.

X-Q. 53. Is that due to the fact that compliance has to be given to the terms of the contract, that when water is scant the estate which owns concessions must receive the maximum amount stipulated in the contract? A. Yes, sir.

X-Q. 54. Is it true or not that it was by reason of the scarcity of water that The People of Puerto Rico had to join the Toro Negro river with the Guayabal dam with the object of increasing the flow of water not only with the object of supplying the concessions but also with the object of supplying the landowners who had no concessions at all?

Plaintiff: I object. Witness may not testify about the motives that The People of Puerto Rico or the Insular Legislature had to approve those laws. That is a legal question about which the witness has not been called upon to testify.

A. I must state that I do not think I have testified that the Government carried out those plans with the object of benefiting the concessions. I have said that the latter are benefited as a consequence of that.

X-Q. 55. Now let me ask you; is it not true that the reason why Toro Negro was joined to the lake and Guayabal dam was that there were occasions in which the waters of the Jacaguas river were not enough to supply in addition to the concessions, other

landowners which you also had to supply? *A.* The irrigation service, was joined to the river with the object of constructing the Guineo dam, so as to increase the supply of water. That was done, of course, in order to have a greater amount of water for its own lands and it happened that physically all the concessions are located in such a wise that most of the benefits received go to the concessions. So that all expenses incurred in the construction and operation of the irrigation system represent a benefit to the estates owning concessions.

X-Q. 56. But the fact is that when the water at the dam is enough to supply only the concessions, water cannot be supplied to lands which do not own any concessions and that that was the prevailing situation before the Toro Negro river was connected to the lake? *A.* Toro Negro was constructed right from the beginning, and Toro Negro is not subject to the contracts. The contracts stipulate that we may separate the waters of the Toro Negro river without delivering them to you. However, it is impossible to separate them and they mix with all the other waters. So that the stipulation, appearing in the contracts does not benefit The People of Puerto Rico but only yourselves.

X-Q. 57. My question is: When there is not enough water at the Jacaguas river, or in the dam to serve the concessions, did you say that you allow the waters to run and that the concessions are served according to the terms of the concessions granted by the Crown of Spain? *A.* Yes, sir.

X-Q. 58. And that abnormal situation prevailed formerly? *A.* At times.

X-Q. 59. And while that situation prevailed, the persons who did not have any concessions received no water for irrigation purposes? *A.* They did not.

X-Q. 60. Then it became necessary to increase the volume of the waters at the Guayabal dam? *A.* Yes, sir.

X-Q. 61. What did the Government do to increase the volume of water at the dam? *A.* Joined a new source.

X-Q. 62. Who was specially benefited with the increase of the

amount of water at the dam? A. All persons who were supplied water, including the concessions, because if the Jacaguas river became dry, water flowed so slowly that then there was enough water only for two or three concessions.

X-Q. 63. Witness would not deny that the ones who received the greatest benefits were the landowners who had no concessions at all, for then they had enough water to irrigate their lands? A. But they paid for that.

X-Q. 64. But is it true or not that they are the ones who receive the greatest benefits, as before they had no water and now they do? A. Yes, sir.

X-Q. 65. Then, to summarize: All these improvements were made not with the object of benefiting Russell & Co. specifically, but primarily in order that the irrigation system might have enough water to serve the lands which had no concessions? A. These improvements were primarily made as part of greater projects carried out with the object of developing the water sources in Puerto Rico. As an incidental question Guayabal, which occupies a strategic situation in the irrigation system, was benefited thereby.

X-Q. 66. As an expert on the matter, do you believe that The People of Puerto Rico has received no benefits by virtue of the contracts presented in evidence and marked "Defendant's Exhibits A" and "B"?

Plaintiff: That is not in issue. The People of Puerto Rico cannot be benefited by what was given gratuitously to a piece of property owning a concession. The People of Puerto Rico now and the Spanish Government before. The water concession was a donation. I admit that the irrigation system has been highly beneficial to The People of Puerto Rico.

Defendant: And that by virtue of the contracts entered into with Russell—

Plaintiff: Not that. How am I going to admit that the contracts benefit The People of Puerto Rico. The contracts are prejudicial to The People of Puerto Rico.

X-Q. 67. To the irrigation system. Does the irrigation system receive some benefits by virtue of the contract entered into by Russell & Co.? A. The role played by these contracts is in some sense to simplify the delivery of water to the concessions, because if conditions to operate our works and to deliver water had not been admitted or accepted, the Government would have had to make reservoirs at the various tributaries of the Jacaguas river in order to store the water at the intakes; in those conditions the lake would not exist. The contract has been, as said in English, an "experience" which has tended to make less difficult the execution of the contract entered into between you and the Government.

X-Q. 68. But the benefit has been mutual? A. That is right, in so far as it eliminates the possibility of misunderstanding and legal suits, with regard to the amount of water that the concessions would receive. It is in that regard simply that we may speak of benefits.

Defendant: That will be all.

Q. 69 (by Plaintiff). Mr. Luchetti, as chief of the irrigation system do you have to supervise the receipts of the irrigation system? A. I have the full administration of the system.

Q. 70. Including the income received from these taxes? A. Yes, sir.

Q. 71. Could you tell the court how the money obtained from these taxes has been invested? A. Exclusively to pay the expenses incurred in the operation and conservation of the works of the irrigation system.

Q. 72. Is a single cent or some other sum of the amount received from the taxes, used to cancel outstanding bonds or to pay some debt? A. Not a single cent. Under the special law in controversy herein the Commissioner of the Interior and the Treasurer have to carry out certain duties with the object of determining the amount of the tax every year.

Q. 73. Mr. Luchetti, in view of the office that you hold, and in view of your relations with the Department of the Interior, could

you tell the court how is it that the amount of the tax is fixed every year, and specially the tax corresponding to the defendant?

A. The law mentioned by the attorney stipulates and defines clearly the expenses which are to be included in the estimate to be made with the object of determining the tax. The law says that the estimate of the cost of operation of the system, plus the amounts of principal and interest payable on the principal, shall be included in the estimate to be submitted annually by the Commissioner of the Interior to the Treasurer of Puerto Rico. Hence all we do is to supply the necessary data to the Department of the Interior and thus comply with the provisions of the law. I am referring to the general tax:

Q. 74. In order to refresh your memory allow me to present a draft prepared by you. For a better understanding it would be a good idea for you to tell what the general irrigation law provides.

A. The general act provides that the cost of maintenance and repairs estimated by the Commissioner of the Interior shall be added to the amount payable during the next fiscal year as principal and interest on the debt, and from the sum of these expenses, the income resulting from the sale of electricity and water shall be subtracted, and the resulting difference shall be equally divided among each acre of land, including those of the irrigation district which sum up to 26,000 and odd acres of land. Out of those 26,000 acres, there are 2,000 that receive credit for concessions granted. Hence, the difference is divided into 24,000 acres of land in order to fix the ordinary tax of the irrigation system, which includes the cost of construction and conservation. The tax fixed by Act No. 49 of 1921 refers solely to the expenses of operating the system and in making an estimate of those expenses, and orders that an estimate of those expenses be submitted to the Treasurer of Puerto Rico in order that he may use the same in his mathematical operation; and the law requires from the Treasurer of Puerto Rico and from the Commissioner of the Interior that the expenses of the hydroelectric system, be separated from those of the irrigation system. Then it states which

are, strictly speaking, the expenses of the operation of the irrigation system and which are those of the hydroelectric system. From those expenses is deducted the amount which may come to the irrigation fund from water in excess, and the sum obtained is divided by 32,000-odd acres which is the total number of acres benefited by the irrigation system, including the concessions, and the resulting quotient is the amount assessed as special tax for the maintenance of the irrigation system. To be more exact, in the administration of the system that money is not charged to the owners of the concessions, so that the owner pays only for the operation expenses, that is for the operation and conservation of the system, for the amount of water that they receive. In order to make the estimate the superavit resulting from the previous year compared with the estimate for the next year is deducted and then the same is credited to the cost. Hence the owner of the concession does not pay a cent in excess of the actual cost of operating the system.

Q. 75. Are these operations and data taken into consideration by the Commissioner of the Interior with the object of communicating to the Treasurer the approximate estimates of the operation cost? A. He simply makes the arithmetical operation defined by law.

Plaintiff: That will be all.

X-Q. 76 (by Defendant). Then Mr. Luchetti, who determines the rate of taxation to be paid under Act No. 49 of 1921? A. The act itself.

X-Q. 77. Does the act say that the Commissioner of the Interior shall determine the rate? Who determines whether it is two or three per cent?

Plaintiff: That is an opinion.

A. What the Commissioner of the Interior simply does it to supply the data.

X-Q. 78. Who fixed the rate of taxation in 1922? A. The Treasurer of Puerto Rico.

X-Q. 79. Did not the Commissioner of the Interior do that?
A. The Commissioner supplies the data. The Treasurer fixes the tax.

Plaintiff: That detail may be explained by Mr. Martinez Chapel.

Defendant: The law says that. That will be all.

SWORN TESTIMONY OF JUAN MARTINEZ CHAPEL.

Q. 1 (by Plaintiff). What is your name? A. Juan Martinez Chapel.

Q. 2. What is your occupation? A. Assessor of corporations and officer in charge of matters pertaining to the irrigation tax in the Treasury Department of Puerto Rico.

Q. 3. As an officer of the Department of Finance of Puerto Rico have you had anything to do with regard to the application of Act No. 49 of 1921? A. Yes, sir.

Q. 4. What have you had to do with that? A. For many years I have been the officer in charge—

Q. 5. Are you in charge of that bureau? A. In connection with irrigation matters I am the officer in charge of the irrigation taxes.

Q. 6. Are you the person who makes the necessary calculations with the object of enforcing the irrigation tax laws? A. Yes, sir.

Q. 7. With regard to this special tax, what personal intervention have you had in carrying out the necessary mathematical operations with the object of enforcing every year the aforesaid act and of levying the corresponding taxes? A. A letter is written every year to the Commissioner of the Interior with the request that he certify the expenses incurred in the conservation of the irrigation system, as well as the income that he imagines the irrigation system will have, from the sale of water and from the sale of hydroelectric power. In making these calculations an estimate is made of the amount to be paid by each parcel under Act 49, as follows: To the amount estimated as the conservation cost of the irrigation system, the amount to be spent in hydroelectric power is deducted, as well as the amount they expect to

receive from the sale of water during that year. To the balance is added whatever deficit there may have been during the prior year and any superavit deducted. The amount remaining after that operation is divided between the number of acres which receive water from the irrigation system. The quotient resulting from the division of the amount estimated by the number of acres, is then the rate of taxation.

Q. 8. Referring to the case of the defendant, please cite examples showing how the tax has been figured for several years.

Plaintiff: I wish to clearly state that all this is specified by Act No. 49 of 1921. If there is some difference between the testimony of the witness and what the law specifies, the court shall take into consideration what the law provides.

A. For the year 1925-26, the Commissioner of the Interior figured that the expenses to be incurred in the operation and conservation of the irrigation system for that year would be \$169,325. From that amount \$57,435 would correspond to the hydroelectric system and \$20,000 to the sale of water. The amount corresponding to the hydroelectric system plus the \$20,000 corresponding to the sale of water, or a total of \$77,435, is deducted from the water system and from the conservation and operation expenses. A balance of \$91,890 remained. To this amount the sum of \$5,313.57, the deficit for the former year, had to be added and this gave a total of \$97,203.57. This amount divided by 32,476.59 acres which receive water, gives 2.99, which was the rate fixed on each acre as cost of maintenance of the irrigation system.

Q. 9. During the number of years to which the complaint refers, that is, during the years 1922 to 1934, has that rate been different or has it been the same? A. The rate of taxation differs according to the water sold and the estimated expenses.

Q. 10. Then there are factors which differ? A. They differ every year.

Q. 11. Please mention some factors for 3 or 4 years. A. During the year 1926-27, instead of a deficit of \$5,000 there was a

superavit of \$16,000. This superavit is deducted instead of being added.

Q. 12. And the rate of taxation was? A. \$2.99 because the estimated cost was higher. \$2.99, about the same as the former year. In the year 1928-29 there was a superavit of \$5,000, and the rate was \$2.86, because the amount estimated for expenses was lower than the former year.

Q. 13. What is the custom followed by the Finance Department in connection with taxpayers in so far as this data is concerned, are these data communicated to the taxpayers? A. As soon as these data are delivered, the same are forwarded to each taxpayer, to the person who owns or is the lessee of a parcel of land, to both. There is a printed sheet showing the cost or amount estimated by the Commissioner of the Interior as operating expenses; the amount corresponding to the hydroelectric system; the superavit of the former year; the number of acres according to which the rate of taxation per acre is determined; and showing finally the amount that everyone has to pay per acre according to the number of acres in his possession.

Q. 14. Does the taxpayer know what becomes of the amount collected as irrigation tax, whether it is deposited in an ordinary fund or in a special fund in the Treasury Department? A. It is deposited in a special fund known as "Irrigation Fund".

Q. 15. How is it spent? A. In irrigation exclusively.

Q. 16. In what part of the irrigation system? A. That amount is invested in the maintenance of the system.

Q. 17. In the operation of the irrigation system? A. Yes, sir.

Q. 18. Is not part of the amount used in paying part of the bonds issued by The People of Puerto Rico to construct the irrigation system? A. I am not the person in charge of the distribution of the money, it remains as an irrigation fund.

Q. 19. Is it not mixed with the other funds in the Treasury Department? A. No, sir.

Q. 20. In fixing the tax rate, what is taken into consideration

is the cost of the irrigation system but not the bonds nor the interest thereon? A. That concerns the other taxpayers.

Q. 21. The only thing taken into consideration is the operation expenses? A. The operation expenses.

Plaintiff: That will be all.

X-Q. 22 (by Defendant). Have you any information as to the rate of taxation for the year 1924? A. 1924 to 1925?

X-Q. 23. Yes, sir. A. Yes, sir.

X-Q. 24. What was it? A. The rate was 3.3070.

X-Q. 25. For the year 1929-30, what was the rate? A. 2.1650.

X-Q. 26. So that the tax differs for every year from 2.16 to 3.30? A. The highest was 3.30 for the year 1924-25 and the lowest 2.12.

Defendant: That will be all.

Plaintiff: I offer in evidence, in the first place, this return showing all the amounts mentioned and the rate of taxation for each of the parcels. In the second place these blanks, which are notices to taxpayers, showing how the tax has been figured for several years.

Defendant: There is no objection on our part.

Judge: Admitted.

X-Q. 27 (by Defendant). Then, Mr. Witness, you are the officer who determines the rate of taxation for a certain year? A. Yes, sir.

X-Q. 28. Were you the person who fixed the tax in 2.16 and 3.30? A. In accordance with the data furnished to me by the Commissioner of the Interior and in conformity with the law and the number of acres.

Defendant: That will be all.

Plaintiff: That is our case.

Defendant: The only evidence we have is the stipulation of facts.

Documentary Evidence for the Plaintiff.

EXHIBIT 1.

(As a plan is involved, the same can not be copied herein.)

EXHIBIT 2.

(As a plan is involved, the same can not be copied herein.)

EXHIBIT 3.

(As a plan is involved, the same can not be copied herein.)

EXHIBIT 4.

"November 12th, 1925.

"MEMORANDUM FOR MR. JOSE A. LOPEZ ACOSTA, ASSISTANT
ATTORNEY GENERAL.

Re: Injunction Case; Russell & Co., S. en C., *v.* The Treasurer
of Porto Rico, to prevent the collection of the Special
Irrigation Tax levied in accordance with
Act No. 49 of 1921.

"In the table entitled 'Spanish Water Concessions from the
Jacaguas river', attached to this memorandum and marked 'Ex-
hibit A-1', are listed the water concessions from the Jacaguas
river existing prior to the construction of the Public Irrigation
System. Opposite the name of each concession, and in separate
columns, are given:

"1st. Their order of priority, that is, the order in which
they were entitled to take water, up to the amount allowed
under the concession rights from the available flow in the
river;

"2nd. The amount of water allowed to be taken.

"3rd. The flow of water necessary in the river to supply
the respective concessions after all prior concessions had been
satisfied. The figures on this column are consequently the
sum of all the concession amounts preceding and including
the corresponding concession.

"This table (Exhibit A-1) has been prepared using the quantities and limits specified in the schedule, 'Cuadro Definitivo de Distribucion de Aguas del Rio Jacaguas de la Isla de Puerto Rico', approved by Royal Decree of June 8, 1880, mentioned in Clause Six of the Contract signed on August 26, 1914, covering water deliveries to Fortuna Estates. The blue print attached, and marked on the back Exhibit A-2, is a true copy of that schedule. The 'Order of Suspension', given in the schedule corresponds to the 'Order of Priority' given in Exhibit A-1; thus, the concession to be suspended first when water is not sufficient to supply all concessions is the last one in the order of priority for use of water; the second concession to be suspended, is the next to the last in the order of priority, and so on.

"Attention is invited to the fact that the amount of water allowed to be taken from the river under the concession rights, defines a *limit* as to the amount receivable when the flow or supply of water in the river is sufficient to permit the exercise of the right to take the water, but by no means does it establish for the owner of the concession a guarantee that that amount of water shall be continuously available for his use since that guarantee necessarily depends upon the stage of the river, which is an *uncertain* condition.

"Thus, when Clause 3 (for instance) of the Contract for Fortuna Estates (hereinafter referred to as the Contract) speaks of the Estate 'Luciana' as entitled to an appurtenant right to take from the Jacaguas River 82.54 liters of water per second; and immediately after cites the amount of 2,111.142 acre-feet of water per year, as the equivalent of the 82.54 liters per second, this equivalence must necessarily be given as merely intended to state that in case there is in the river plenty of water *continuously* available throughout the year then that authorized number of liters per second will add up 2,111.142 acre-feet in a year. Under the terms of the concession, water is allowed to be taken (when available), at the *rate* of not to exceed 82.54 liters per second, but *not* at the *rate* (unless water be constantly available) of 2,111.142

acre-feet per year. The latter is a resultant quantity which depends on the elements 'time' and 'quantity of water available'. If water is lacking to supply the concession, say during but one second of time in any one year, then the total accruing to that concession during that year can not physically be more than 2,111,142-acre-feet less 82.54 liters.

Therefore, in determining whether the lands covered by the Jacaguas River Concessions receive more or less water prior to the construction of the Public Irrigation System, than they have been receiving since, under the concession contracts, a *comparison can not be established* between the equivalent number of acre-feet resulting by multiplying the concession rate in liters per second by the number of seconds in a year (the equivalent mentioned in the contract), and the total number of acre-feet agreed upon in the contracts to be delivered per year by the irrigation service at the rate of so many acre-feet per day or their equivalent rate of so many cubic-feet per second. This comparison not being possible for the obvious reason that deliveries by the Irrigation Service are regularly made daily on a total yearly basis, while previously the yearly total depended on the number of days in the year when water was available in the river, which in most cases represented a low percentage of the time.

A review of the conditions of flow of the Jacaguas River during several years previous to the construction of the Guayabal Reservoir, is necessary in order to compare amounts of water available for irrigation of concession lands before and after Irrigation System was built.

Please refer to the attached graphs on the five cross-section sheets marked 'Exhibit B-1'. On each of these five sheets have been plotted the *hydrograph* of the Jacaguas River for the years 1910, 1911, 1912, 1913, and 1914 respectively. The broken line is the hydrograph, which is formed by joining the points plotted for each day of the year to correspond with the number of cubic-feet per second of flow in the river on that day. Measurements

of this flow were made and recorded daily by the Irrigation Service, and this hydrograph is a graphic reproduction of those records.

"The vertical cross-section lines represent the days of the year, and the horizontal cross-section lines represent number of cubic feet per second of flow.

"The peaks of the curve (hydrograph) show the floods occurring in the river.

"The hydrograph for the year 1914 has been plotted only up to June 30, 1914. Since that date the Guayabal Reservoir has been in operation, and deliveries of concession water has been made from the Irrigation System.

"The straight horizontal lines denoted by the names of the Concessions, represent the flow required as given in the last column of 'Exhibit A-1', to furnish water to prior concessions plus the corresponding concession.

"With these hydrographs and the lines representing the flow required to furnish the concession water, the conditions of supply and requirements for concessions, can be analyzed.

"Let us examine the graph for the year 1910: The hydrograph (broken line) lies above the horizontal line corresponding to Fortuna, throughout the year. This shows that the flow was always sufficient to supply fully the Fortuna Concession. The Serrano Concession, however, cuts the hydrograph on June the 7th, and remains above it until June 26, which shows that during the days elapsing between these two dates, there was not sufficient water in the river to supply the Serrano Concession. By tracing the Serrano line further, it is seen that there were several other short periods when there was not sufficient water for this concession. Adding these periods we find that there was during the year, 1910 a total of 38 days on which the flow was *deficient* and no water could be taken by the Serrano Concession.

"To further illustrate, take the case of the Luciana Concession for the same year 1910. No water was available in the river during the months of January, and February, and until March 15. Again there was no water from March 23 until April 15, from

April 17 to April 21, from April 27 to May 6, and so on, these periods of deficiency totalling 210 days.

This same analysis made for all the concessions controlled by Russell & Co., S. en C., and for the $4\frac{1}{2}$ years previous to beginning operation of the Guayabal Dam, gives the result shown in the Tabulation attached to this memorandum, marked Exhibit B-2.

That Tabulation (Exhibit B-2) gives for each concession the total number of days during the four and a half years from January 1, 1910 to June 30, 1914, in which there was not enough water in the river to supply the concession. These numbers of days deficiency, reduced to percentages of the number of days in $4\frac{1}{2}$ years, and multiplied by the total amount of water (total acre-feet receivable) that would have been taken by each concession if drawing water at a constant rate of so many liters per second (had water been constantly available) during the $4\frac{1}{2}$ years, will give the amount of water that each concession did not take because of lack of water in the river. Deducting this total deficiency from the total receivable as authorized under the concession, for the four and a half years there remains a total *actually* received by the concessions amounting to 50,382.16 acre-feet.

On the other hand, according to records, the Irrigation Service delivered to the same concessions during the four and a half years from January 1, 1915 to June 30, 1919, a total of 59,974.68 acres-feet, which represents an increase of 9,592.52 acre-feet over what the concessions received when they had to do with just what the river carried without the aid of the Irrigation System Works. This increase represents a *very material* BENEFIT, as to volume of water alone, amounting to 19% over their former supply.

Please be it noted also, that the $4\frac{1}{2}$ years from 1910 to 1914 inclusive, taken here to show the amount of water received by the concessions without the aid of the Irrigation System, were relatively wet years as compared to other years, such as the year 1908 which was a very dry year in that section of the country, and therefore they are representative of favorable conditions as to flow of the river.

"There is also attached to this memorandum a tabulation showing the total deliveries of water made by the Irrigation Service each year, from 1915 to 1924, inclusive, to all concession lands owned or operated by Russell & Co., S. en C. This tabulation is marked 'Exhibit C'.

"The quantities given in this tabulation show that with the exception of the years 1922 and 1923, which were extraordinarily dry years, deliveries have invariably exceeded the amount appurtenant under the contract.

"It should be stated that conditions as to rainfall during the years 1922 and 1923 were so critical, that had it not been for aid of the Irrigation System the Jacaguas River concessions would have gone through a very difficult situation. It suffices to state that the Jacaguas River flow, exclusive of the water added from the Toro Negro River, decreased and stayed low, reaching about the middle of June, 1923, the low mark of 2.61 cubic-feet per second which would not have been sufficient even for the Fortuna Concession alone, the first one in the order of priority, had these concessions depended, ~~as of old~~, on just the flow of the Jacaguas River.

"Summing up the above information and other considerations of weight in forming an estimate of the advantages or benefits received by the Jacaguas River Concession lands from the Public Irrigation System, the following points should be taken into account:

- "1. As regards quantity of water available for irrigation of the lands entitled to concession water from the Jacaguas River, it has been shown that the quantity received from the Irrigation System is 19% larger than what these lands used to take from the limited flow than available in the river.

- "2. It is evident that the application of irrigation water to cultivated lands, in the *amounts* and at the *time needed* is an immense advantage over the uncertain system which the planter has to follow when he has to depend on the proba-

bility of rainfall to increase the run-off of the stream from which he derives his irrigation water.

The Irrigation System with its storage reservoir impounds the flood waters, and is thus able to make regular deliveries on which the planter can count daily, and the sequence of cultivation; plowing the land, planting, irrigating, applying fertilizers, continuing irrigating during the growing period, and harvesting, can be scheduled ahead thus insuring results. The large *benefit* thereby resulting is easily appreciated.

3. With the construction of the Irrigation System the sources of supply to furnish the water appropriated by concessions from the Jacaguas River, have been very materially increased with the inflow of the waters from the Toro Negro River watershed, which lies north of the main divide of the Island, these waters being diverted to the south side into the Jacaguas River Valley and to the Guayabal Reservoir, through the Tunnel cut through the Toro Negro Mountain. These waters are pooled together in the Reservoir from which is drawn the flow to serve Concessions lands and lands included in the Irrigation District. No separation can be made of the Toro Negro Waters for purposes of reserving them for the exclusive use of the included lands, since under the terms of the Contract, full deliveries of the amount of water specified in said Contract have to be made as long as there is storage in the reservoir; and by definition made in the last paragraph of Clause Sixth of the Contract, there is 'storage' as long as the water rises over three feet above the bottom of the outlet gates.

This limit of three feet is of course so low that it practically insures for the Fortuna Estates a *full* delivery, except in those cases when the reservoir is entirely drawn down (dry), and those cases take place but very seldom, and during dry years only. It is also worth noting that while the lands included in the Irrigation District (lands which pay the water

tax to pay the cost of construction, maintenance and operation of System), have to go with only a percentage of their appurtenant water when the supply in the reservoir is low, in order to make it last through the period of low run-off in the watershed and receive during that period at least part of the water required, the Fortuna Estates, as well as the other Jacaguas River concessions, continue, by virtue of the terms of this contract, receiving their full, 100% appurtenant amount. Obviously these concession lands receive a substantially *larger benefit* than the included lands, having as they have a preferential, undiminished water service from the Reservoir. And they are given this undiminished or uniform (regular) service with waters that come both from the Jacaguas River and from the Toro Negro River watersheds. And this substantial reinforcement in the water supply furnished by the Toro Negro River, as well as the supply of impounded flood waters of the Jacaguas River, are made available for the benefit of the Fortuna Estates and the other concession lands, by the costly structures forming the Irrigation System, structures which require maintenance and proper operation and corresponding annual expenditures.

And even during the short periods that occur in dry years, when the reservoir is without storage and the Jacaguas Concessions take their supply from the run (flow) of the River, these concessions get the full benefit of the water coming from Toro Negro, because it is at such times that the work of cleaning and removing silt in front of the gates can be made and is carried out, and this work necessitates the total available flow to carry away the silt, this total flow (including Toro Negro Water) running down and becoming available for the irrigation of the Concession Lands.—And moreover, when advantage need not be taken to carry out this cleaning, the Irrigation Service finds it impracticable to separate the Toro Negro Waters for their use on the included lands, because their amount is relatively small to permit an economical

distribution among the upwards of 11,000 acres of included lands served from this Reservoir, and if allowed to remain in the Reservoir to accumulate a sufficient amount which would permit a practical distribution among such lands, then the limit of three feet which defines 'storage' available, would be reached in a few hours, and thereupon, by operation of the Contract, the full 26.5 cubic feet per second required to make full deliveries to the Concessions, would have to be drawn out, thus depleting in a very few hours the small storage accumulated, and practically all of it going to supply the Concessions. Therefore, the Irrigation Service cannot resort to separating the Toro Negro Waters, they going in their entirety to benefit the concession during the dry periods of the reservoir.

Such conditions account for the fact that while the concession lands form 31.4% of the total acreage irrigated from the Guayabal Reservoir, and the included lands the remaining 68.6% the concession lands received during the years 1916 to 1920 inclusive (which were fair average years as regards water supply), 35.5% of all the water delivered from the Reservoir, while the included lands only received 64.5%. And during the years 1921 to 1923, inclusive, in which period several long droughts occurred, the concession lands received 43.2% of all the water delivered from the Reservoir, while the included lands only received 56.8%. These percentages show conclusively the advantage of the concession lands over the included lands in the matter of receiving service from the Public Irrigation System, this advantage being even greater during the dry seasons of the year and when droughts occur, exactly the times when those concessions formerly had to go without water.

"This lengthy explanation is made to suggest the extent of the benefit received by the Fortuna Estates as well as the other Jacaguas River Concessions, with the construction and operation of

the Public Irrigation System and the protection given them by the Contracts of August 26, 1914. Their water supply for irrigation has certainly been substantially increased, not only in regard to quantity, but also and very materially as regards dependability particularly, as already stated, during the dry periods, when water is most needed and when it used to be conspicuous by its scarcity before the Irrigation System was built.

"4. There is yet a further advantage accruing to the benefit of the concession lands, brought about through the construction and operation of the Irrigation System. To the extent that the terms of the existing Contracts permit, temporary changes are allowed in the distribution of the waters, either as regards quantities or places of delivery to better meet at the proper time the requirements of the land. These changes consist in transferring part or all of the waters deliverable at a specified point, to another or other intakes where a more advantageous disposition can be made of it by the water users. These changes are allowed either at the special request of the concessionaires (water users) to suit their own convenience, or because the change is suitable to both parties, the user and the Irrigation Service, under the conditions obtaining at the time.

Under the terms of the Contract the Irrigation Service is required to make deliveries of specified amounts of water from the main distribution canal to certain Estates, and also at certain intakes located by the side of the river for other Estates. To supply the amounts deliverable at these river intakes, the Service has to let out from the main canal into the river enough water to supply the amount specified at the intake, plus that amount lost by evaporation, absorption and seepage, along the several miles of river channel over which it has to travel to reach the intake.

It often happens that the water users (Concessionaire) can make better use of the water deliverable at a river intake, if it is delivered to him at one of the points on the main canal

where other waters pertaining to him are usually delivered, or he might request that the waters deliverable at a river intake be turned over to him at another river intake located higher up stream, from where he can to better advantage irrigate each at a time both the higher land and the lower land, with the combined amounts of water belonging to the respective separate concessions. These requests might coincide with conditions obtaining in the river, which would make it desirable for the Service to grant the request. Thus, during a period of drought, the loss by evaporation and absorption along the old river channel, is considerable, and this condition would call for a larger discharge from the canal into the river to take care of the larger loss. Under such conditions it is best for the Service to deliver the water from the canal, if the Concessionaire so desires it, than it would be to make delivery at a remote river intake.

As instances of such changes may be cited the following:

The water corresponding to the Estate "Cristina" and deliverable a long distance down in the bed of the river near the Aruz Pump, is very often delivered to Russell & Co., S. en C., at their request and with their consent, from the Juana Diaz Main Canal into their distribution reservoir located on the Estate Luciana.

The waters corresponding to the Estates "Union" and "Placeres" (which by the way represent a small percentage of the total amount of waters deliverable to Russell & Co., S. en C., as compared to the combined amounts pertaining to the Estates "Luciana", "Cristina", "Fortuna" and "Serrano"), are, at the request and consent of Russell & Co., S. en C., delivered during a great part of the time, at the river intake corresponding to the "Serrano" concession. This intake is located several miles up stream from the intakes for "Union" and "Placeres", and consequently the delivery of their water at this higher intake represents a saving of the amount of

water that would be lost in the additional travel required to reach the lower ones.

During part of the time the seepage water which finds its way into the Jacaguas River channel along its travel from the Guayabal Dam to the sea, helps to complete the supply of water required to furnish the concession amounts deliverable at the river intakes. The availability of this seepage water is of course traceable to the existence and operation of the Irrigation System. To the river channel, which drains that section of country, must travel the seepage from the Guayabal Reservoir itself, and from the main distribution and lateral canals, plus the seepage from the neighboring lands under irrigation which being saturated with the water received from the Irrigation System have to yield a large amount of seepage. It is obvious that while this seepage water, as long as and to the extent that it becomes available at the point or points of intake of the water concessions,—represents an advantage toward the operation of the reservoir, in that just that much less water has to be drawn out, nevertheless the fact cannot be denied that its benefit, which is derived from the Irrigation System, goes directly to the users (the Concessionaires) of the water, and that its occurrence reserves a further benefit for the concession lands because the amount of water which such seepage supply makes unnecessary to draw from the Reservoir, remains there in store to supply the concession when dry times come.

ANTONIO LUCHETTI,

Chief Engineer,

Porto Rico Irrigation Service.

Encls.

November 12th, 1925.

The undersigned, Hydrographer of the Porto Rico Irrigation Service, hereby certifies that the information and data given on the tabulations and graphs attached hereto and marked "Exhibit A-1", "Exhibit A-2", "Exhibit B-1", "Exhibit B-2", and "Exhibit C", are true and exact reproductions of information and data as

found in the records of my office, which records are based on actual measurements and observations made by engineers and assistants of the Porto Rico Irrigation Service during the years that this Service has been in existence.

DOMINGO PANAINI,
Hydrographer,
Porto Rico Irrigation Service:

TABULATION SHOWING THE NUMBER OF DAYS DURING THE FOUR AND A HALF YEAR PERIOD FROM JANUARY 1, 1910 TO JUNE 30, 1914, IN WHICH THE FLOW OF THE JACUAS RIVER WAS INSUFFICIENT TO FURNISH ANY OF THE WATER ALLOWED UNDER THE SPANISH CONCESSIONS TO THE ESTATES OWNED OR OPERATED BY RUSSELL & CO., S. en C.

YEAR	PORTUÑA	SERRANO	UNION	AMELIA	LUCIANA	CRISTINA	PLACERES	TOTAL
1910	0	38	151	209	210	214	217	217
1911	0	3	145	187	199	215	217	217
1912	0	26	189	153	193	180	189	189
1913	0	14	157	137	218	258	270	270
1914	0	9	113	138	140	147	147	147
TOTAL DAYS	0	70	615	631	646	634	636	636
Time DEFICIENCY	0%	6%	42%	54%	57%	52%	55%	55%
Total acre-feet RECEIVABLE IN 4 1/2 years	16,078.09	11,769.86	4,856.80	23,875.28	9,496.94	12,280.95	2,531.07	80,411.49
Acre-feet DEFICIENCY	0	707.39	1,913.65	12,786.87	5,413.26	7,614.19	1,594.87	30,029.33
Amount RECEIVED IN 4 1/2 years	16,078.09	11,062.47	2,943.15	10,892.01	4,083.68	4,666.76	936.20	50,382.16
Total amount delivered to above Estates by the Porto Rico Irrigation Service in the period of 4 1/2 years from January 1, 1915 to June 30, 1919							59,974.68	acre-feet
Total amount taken by above Estates under the Spanish Concessions during the 4 1/2 years (from January 1, 1910 to June 30, 1914) preceding the completion of the (Irrigation Services) Guayabal Dam							50,382.16	"
INCREASE in water for irrigation of above Estates, brought about by Public Irrigation System							9,592.52	"
							19% BENEFIT	"

PORTO RICO IRRIGATION SERVICE
— GUAYAMA, P. R.

SPANISH WATER CONCESSIONS
FROM THE
JACQUEZ RIVER.

ESTATE	ORDER OF PRIORITY	CONCESSION AMOUNT CUBIC FEET PER SECOND	STRAIN FLOW REQUIRED TO COVER CONCESSION AMOUNT BY PRIOR CONCESSIONS.
Town of Juana Díaz	1	0.141	0.141
Fortuna	2	4.985	5.076
Boca Chica	3	3.487	6.803
Serrano	4	3.619	12.122
Ureula	5	4.244	16.366
Potale	6	5.548	21.914
Unión	7	1.398	23.312
Anella	8	7.268	30.580
Laciara	9	2.915	33.495
Cristina - Arus Pump	10	3.770	37.265
Boca Chica	11	1.279	38.544
Flacores	12	0.777	39.321
San Fernando	13	1.867	41.188

PORTO RICO IRRIGATION SERVICES,
GUAYAMA, P. R.

CONTRACTS UNDER CONCEPTION CONTRACTS

FROM
THE PUBLIC IRRIGATION SYSTEM
TO

TO
 BE OWNED OR OPERATED BY RUSSELL & CO., S. and C.

[illegible]

NOTE: Russell & Co., S. en C. ceased to operate the Estate Amelia on June 30, 1921.
 " Shortage in deliveries (very small) for the year 1919 was due to non-acceptance of water offered by Irrigation Service.
 " Years 1922 and 1923 were extraordinary dry years.

PUERTO RICO IRRIGATION SERVICE
GUAYAMA, P. R.

TABULATION SHOWING AMOUNT OF WATER, IN ACRE-FEET, DELIVERED TO THE LUCIANA, CRISTINA, FORTUNA, SERRANO, UNION, PLACENSE AND AMELIA CONCESSIONS DURING THE FOUR AND A HALF YEAR PERIOD, FROM JANUARY 1ST, 1931 TO JUNE 30TH, 1936.

	1931	1932	1933	1934	1935	TOTAL
APPORTIONMENT WATER DELIVERED IN ACCORDANCE WITH THE IRRIGATION SERVICE AGREEMENTS	11,860.39	11,403.35	11,405.30	11,403.41	5,701.65	51,801.10
EXCESS DELIVERED DURING PERIODS OF OVERFLOW OF CUYABAL RESERVOIR	4,470.56	5,568.73	6,082.97	2,312.20	1,229.97	20,665.12
TOTAL DELIVERIES	16,060.95	16,992.06	17,425.27	12,717.31	6,960.62	72,156.23
BENEFIT	38.57%	49.01%	52.82%	24.06%	22.06%	40.11%

TABULATION SHOWING AMOUNT OF WATER, IN ACRE-FEET, DELIVERED TO THE LUCIANA, CRISTINA, FORTUNA, SERRANO, ARUS, UNION, PLACENSE AND AMELIA CONCESSIONS DURING THE FOUR AND A HALF YEAR PERIOD, FROM JANUARY 1ST, 1931 TO JUNE 30TH, 1936.

	1931	1932	1933	1934	1935	TOTAL
APPORTIONMENT WATER DELIVERED IN ACCORDANCE WITH THE IRRIGATION SERVICE AGREEMENTS	12,161.64	11,974.60	11,973.55	11,974.66	5,987.28	54,071.73
EXCESS DELIVERED DURING PERIODS OF OVERFLOW OF CUYABAL RESERVOIR	4,690.49	5,948.70	6,324.70	3,479.90	1,222.04	21,685.82
TOTAL DELIVERIES	16,852.13	17,943.30	18,298.25	15,454.56	7,209.32	75,757.56
BENEFIT	39.57%	49.01%	52.82%	24.06%	22.06%	40.11%

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The People of Puerto Rico
Department of Finance Bureau of Property Tax

San Juan, Puerto Rico, July 1, 1934.

Mr.

Sir: The tax for the fiscal year 1934-35, fixed by virtue of Act No. 49, of 1921, on certain lands which receive water from the irrigation system of the southern coast and which do not pay the other tax determined by the irrigation act, is determined as follows:

Amount estimated by the Commissioner of the Interior to cover the cost of operation and conservation of the irrigation system during the fiscal year 34-35 \$117,515.00

Amount which according to the estimate of the Commissioner of the Interior is expected to be received from the sale of water during same year (to be deducted) \$35,600.00

Balance \$82,515.00

Superavit over the amount estimated for the year 1932-33 \$20,754.82

Total \$61,760.18

Divided between the lands determined by law, under the headings hereinafter mentioned:

Headings:	Number of Acres:
(1)	24,034.5907
(2)	2,905.7793
(3)	2,264.79
(4)	3,271.43
Total	32,476.59

Annual rate of taxation per acre \$1.9016822235

In conformity with the above, on parcel No. , Plan , of which you are owner or representative, the following tax has been assessed for the year 1934-35.

The concession of acre-feet, at the rate of acre-feet,

per acre, on an area of acres, which multiplied by the above rate of taxation gives an annual tax of \$.

Amount payable each semester \$, payable July 1, 1934, the first semester, and January 1, 1935, the second semester.

Please take notice of the above in order that you may make the corresponding payments on the dates above specified:

Yours very truly,

MANUEL V. DOMENECH, Treasurer.

The People of Puerto Rico

Department of Finance Bureau of Property Tax

San Juan, Puerto Rico, July 1, 1933.

Mr.

Sir: The tax for the fiscal year 1933-34, fixed by virtue of Act No. 49, of 1921, on certain lands which receive water from the irrigation system of the southern coast and which do not pay the other tax determined by the irrigation act, is determined as follows:

Amount estimated by the Commissioner of the Interior to cover the cost of operation and conservation of the irrigation system during the fiscal year 1933-34 \$95,665.00

Amount which according to the estimate of the Commissioner of the Interior is expected to be received from the sale of water during same year (to be deducted) \$15,000.00

Balance \$80,665.00

Superavit over the amount estimated for the year 1931-32 \$8,186.22

Total \$72,478.78

Divided between the lands determined by law, under the headings hereinafter mentioned:

Headings	Number of Acres
(1)	24,034.5907
(2)	2,905.7793
(3)	2,264.79
(4)	3,771.43
Total	32,476.59

Annual rate of taxation per acre \$2.2317248948

In conformity with the above, on parcel No. , Plan , of which you are owner or representative, the following tax has been assessed for the year 1933-34

The concession of acre-feet, at the rate of acre-feet per acre, on an acre of acres, which multiplied by the above rate of taxation gives an annual tax of \$

Amount payable each semester \$, payable July 1, 1933, the first semester, and January 1, 1934, the second semester.

Please take notice of the above in order that you may make the corresponding payments on the dates above specified.

Yours very truly,

MANUEL V. DOMENECH Treasurer

The People of Puerto Rico
Department of Finance Bureau of Property Tax

San Juan, Puerto Rico, July 1, 1932.

Mr.

Sir: The tax for the fiscal year 1932-33, fixed by virtue of Act No. 49, of 1921, on certain lands which receive water from the irrigation system of the southern coast, and which do not pay the other tax determined by the irrigation act, is determined as follows:

Amount estimated by the Commissioner of the Interior to cover the cost of operation and conservation of the irrigation system during the fiscal year 1932-33. . . . \$91,688.00
Amount which according to the estimate of the Commissioner of the Interior is expected to be received

from the sale of water during same year (to be deducted)	\$25,000.00
Balance	\$66,688.00
Deficit over the amount estimated for the year 1930-31	\$2,334.92
Total	\$69,022.92

Divided between the lands determined by law, under the headings hereinafter mentioned:

Headings:	Number of Acres:
(1)	24,034.5907
(2)	2,905.7793
(3)	2,264.79
(4)	3,271.43
Total	32,476.59

Annual rate of taxation per acre \$2.1253140829

In conformity with the above, on parcel No. , Plan of which you are owner or representative, the following tax has been assessed for the year 1932-33.

The concession of acre-feet, at the rate of acre-feet, per acre, on an acre of acres, which multiplied by the above rate of taxation gives an annual tax of \$

Amount payable each semester \$, payable July 1, 1932, the first semester, and January 1, 1933, the second semester.

Please take notice of the above in order that you may make the corresponding payments on the dates above specified.

Yours very truly,

MANUEL V. DOMENECH, Treasurer

The People of Puerto Rico
Department of Finance Bureau of Property Tax

San Juan, Puerto Rico, July 1, 1926

Mr.

Sir: The tax for the fiscal year 1926-27, fixed by virtue of Act No. 49, of 1921, on certain lands which receive water from the

irrigation system of the southern coast and which do not pay the other tax determined by the irrigation act, is determined as follows:

Amount estimated by the Commissioner of the Interior to cover the cost of operation and conservation of the irrigation system during the fiscal year 1926-27	\$185,825.00
Hydroelectric system (to be deducted)	70,385.00
Amount which according to the estimate of the Commissioner of the Interior is expected to be received from the sale of water during same year (to be deducted)	\$2,000.00
Balance	\$113,440.00
Surplus over the amount estimated for the year 1924-1925	\$16,162.68

Total \$97,277.32

Divided between the lands determined by law, under the headings hereinafter mentioned:

Headings:	Number of Acres:
(1)	24,034.5907
(2)	2,905.7793
(3)	2,264.79
(4)	3,271.43
Total	32,476.59

Annual rate of taxation per acre \$2.9953

In conformity with the above, on parcel No. , Plan , of which you are owner or representative, the following tax has been assessed for the year 1926-27.

The concession of acre-feet, at the rate of acre-feet, per acre, on an area of acres, which multiplied by the above rate of taxation gives an annual tax of \$

Amount payable each semester, \$, payable July 1, 1926, the first semester, and January 1, 1927, the second semester.

Please take notice of the above in order that you may make the corresponding payments on the dates above specified.

Yours very truly,

JUAN G. GALLARDO, Treasurer.

The People of Puerto Rico
Department of Finance Bureau of Property Tax

San Juan, Puerto Rico, July 1, 1924

Mr.

Sir: The tax for the fiscal year 1924-25, fixed by virtue of Act No. 49, of 1921, on certain lands which receive water from the irrigation system of the southern coast and which do not pay the other tax determined by the irrigation act, is determined as follows:

Amount estimated by the Commissioner of the Interior to cover the cost of operation and conservation of the irrigation system during the fiscal year 1924-1925	\$186,878.50
Hydroelectric system (to be deducted)	73,990.00
Amount which according to the estimate of the Commissioner of the Interior is expected to be received from the sale of water during same year (to be deducted)	\$000.00
Balance	\$112,888.50
Superavit over the amount estimated for the year 1922-1923	\$5,486.11
Total	\$107,402.39

Divided between the lands determined by law, under the headings hereinafter mentioned:

Headings:	Number of Acres:
(1)	24,034.5907
(2)	2,905.7793
(3)	2,264.79
(4)	3,271.43
Total	32,476.59

Annual rate of taxation per acre \$3.307071

In conformity with the above, on parcel No. , Plan , of which you are owner or representative, the following tax has been assessed for the year 1924-1925.

The concession of acre-feet, at the rate of acre-feet, per acre, on an area of acres, which multiplied by the above rate of taxation gives an annual tax of \$

Amount payable each semester \$, payable July 1, 1924, the first semester, and January 1, 1925, the second semester.

Please take notice of the above in order that you may make the corresponding payments on the dates above specified.

Yours very truly,

JUAN G. GALLARDO, Treasurer.

The People of Puerto Rico

Department of Finance Bureau of Property Tax

San Juan, Puerto Rico, July 1, 1927

Mr.

Sir: The tax for the fiscal year 1927-28, fixed by virtue of Act No. 49, of 1921, on certain lands which receive water from the irrigation system of the southern coast and which do not pay the other tax determined by the irrigation act, is determined as follows:

Amount estimated by the Commissioner of the Interior to cover the cost of operation and the conservation of the irrigation system during the fiscal year 1927-28 \$101,930.00

Amount which according to the estimate of the Commissioner of the Interior is expected to be received from the sale of water during same year (to be deducted) \$10,000.00

Balance \$91,930.00

Deficit over the amount estimated for the year 1925-26 \$10,215.38

Total \$102,145.38

Divided between the lands determined by law, under the headings hereinafter mentioned:

Headings:	Number of Acres:
(1)	24,034.5907
(2)	2,905.7793
(3)	2,264.79
(4)	3,271.43
Total	32,476.59

Annual rate of taxation per acre \$3.1452004503

In conformity with the above, on parcel No. , Plan of which you are owner or representative, the following tax has been assessed for the year 1926-27.

The concession of acre-feet, at the rate of acre-feet, per acre, on an area of acres, which multiplied by the above rate of taxation gives an annual tax of \$

Amount payable each semester \$, payable July 1, 1927, the first semester, and January 1, 1928, the second semester.

Please take notice of the above in order that you may make the corresponding payments on the dates above specified.

Yours very truly,

JUAN G. GALLARDO, Treasurer.

The People of Puerto Rico
Department of Finance Bureau of Property Tax

San Juan, Puerto Rico, July 1, 1925

Mr.

Sir: The tax for the fiscal year 1925-1926, fixed by virtue of Act No. 49, of 1921, on certain lands which receive water from the irrigation system of the southern coast and which do not pay the other tax, determined by the irrigation act, is determined as follows:

Amount estimated by the Commissioner of the Interior to cover the cost of operation and conservation of the irrigation system during the fiscal year 1925-1926	\$169,325.00
Hydroelectric system (to be deducted)	57,435.00
Amount which according to the estimate of the Commissioner of the Interior is expected to be received from the sale of water during same year (to be deducted)	\$20,000.00
Balance	<u>\$91,890.00</u>
Deficit over the amount estimated for the year 1923-1924	\$5,313.57
Total	<u>\$97,203.57</u>

Divided between the lands determined by law, under the headings hereinafter mentioned:

Headings:	Number of Acres:
(1)	24,034.5907
(2)	2,905.7793
(3)	2,264.79
(4)	3,271.43
Total	<u>32,476.59</u>

Annual rate of taxation per acre \$2.9930349

In conformity with the above, on parcel No. , Plan

of which you are owner or representative, the following tax has been assessed for the year 1925-26.

The concession of acre-feet, at the rate of acre-feet, per acre, on an area of acres, which multiplied by the above rate of taxation gives an annual tax of \$

Amount payable each semester \$, payable July 1, 1925, the first semester, and January 1, 1926, the second semester.

Please take notice of the above in order that you may make the corresponding payments on the dates above specified.

Yours, very truly,

JUAN G. GALLARDO, Treasurer.

The People of Puerto Rico
Department of Finance Bureau of Property Tax

San Juan, Puerto Rico, July 1, 1928.

Mr.

Sir: The tax for the fiscal year 1928-29, fixed by virtue of Act No. 49, of 1921, on certain lands which receive water from the irrigation system of the southern coast and which do not pay the other tax determined by the irrigation act, is determined as follows:

Amount estimated by the Commissioner of the Interior to cover the cost of operation and conservation of the irrigation system during the fiscal year 1928-29	\$108,470.00
Amount which according to the estimate of the Commissioner of the Interior is expected to be received from the sale of water during same year (to be deducted)	\$10,000.00
Balance	\$98,470.00
<i>Superavit</i> over the amount estimated for the year 1926-27	\$5,433.36
Total	\$93,036.64

Divided between the lands determined by law, under the headings hereinafter mentioned:

Headings:	Number of Acres
(1)	24,034.5907
(2)	2,905.7793
(3)	2,264.79
(4)	3,271.43
Total	32,476.59
Annual rate of taxation per acre	\$2.86472933

In conformity with the above, on parcel No. , Plan of which you are owner or representative, the following tax has been assessed for the year 1928-29.

The concession of acre-feet, at the rate of acre-feet, per acre, on an area of acres, which multiplied by the above rate of taxation gives an annual tax of \$

Amount payable each semester \$, payable July 1, 1928, the first semester, and January 1, 1929, the second semester.

Please take notice of the above in order that you may make the corresponding payments on the dates above specified.

Yours very truly,

JUAN G. GALLARDO, Treasurer.

The People of Puerto Rico
Department of Finance Bureau of Property Tax

San Juan, Puerto Rico, July 1, 1931

Mr.

Sir: The tax for the fiscal year 1931-32, fixed by virtue of Act No. 49, of 1921, on certain lands which receive water from the irrigation system of the southern coast and which do not pay the other tax determined by the irrigation act, is determined as follows:

Amount estimated by the Commissioner of the Interior to cover the cost of operation and conservation of the irrigation system during the fiscal year 1931-32 \$102,252.00

Amount which according to the estimate of the Commissioner of the Interior is expected to be received from the sale of water during same year (to be deducted)	\$30,000.00
Balance	\$72,252.00
Deficit over the amount estimated for the year 1929-30	\$23,844.08
= Total	\$96,096.08

Divided between the lands determined by law, under the headings hereinafter mentioned:

Headings:	Number of Acres:
(1)	24,034.5907
(2)	2,905.7793
(3)	2,264.75
(4)	3,271.43
Total	32,476.59

Annual rate of taxation per acre \$2.9589341473.

In conformity with the above, on parcel No. , Plan of which you are owner or representative, the following tax has been assessed for the year 1931-32:

The concession of acre-feet, at the rate of acre-feet, per acre, on an area of acres, which multiplied by the above rate of taxation gives an annual tax of \$

Amount payable each semester \$, payable July 1, 1931, the first semester, and January 1, 1932, the second semester.

Please take notice of the above in order that you may make the corresponding payments on the dates above specified.

Yours very truly,

MANUEL V. DOMENECH, Treasurer.

Permanent Irrigation District

RETURN FOR PURPOSES OF LEVYING SPECIAL IRRIGATION TAX
FIXED BY ACT 49 OF 1921.

Property No. 379.

Owner

Plan: *Mercedita, Fortuna, Juana Diaz**Russell & Co., S. en C.*

Total No. of acres: 736.71

*Ponce, Originally*Name of the Estate: *Luciana*Situated in the Municipality of *Juana Diaz*Ward: *Collores, Cayabo, Jacaguas*

Boundaries

Representative

North: *Jacaguas River**Originally*South: *Jacaguas River,**P.J.D. Road.*East: *Juana Diaz, Villalba, Road**J. Diaz—Town.*West: *Lot No. 380, Jacaguas River.*

Value in acre feet of the water right or concession: 1,260.22

Equivalent to an area of: 315.06 acres.

Taxes

Fiscal year	Receipt No.	Tax rate per acre	Tax per year	Surcharges to March 30	Surcharges to June 30, 1930
1922-1923	13	2.9632113	933.58	406.11	420.12
1923-1924	13	3.26388946	1028.32	385.62	401.04
1924-1925	13	3.307071	1041.92	328.20	343.83
1925-1926	13	2.9930349	942.98	235.74	249.88
1927-1928	12	3.14520045030	990.92	133.77	148.63
1926-1927	13	2.9953	943.70	184.02	198.18
1928-1929	12	2.86472933	902.56	67.69	81.23
1929-1930	12	2.165053484	682.12	8.53	18.76
1930-1931	12	2.37514827	748.32		
1931-1932	12	2.9589341473	932.24		
1932-1933	12	2.1253140829	669.60		
1933-1934	11	2.2317248948	703.12		
1934-1935	11				

Remarks: Tax	\$7,466.10
Surcharges to June 30, 1930	1,861.67
Total	<u>\$9,327.77</u>

Permanent Irrigation District

RETURN FOR PURPOSES OF LEVYING SPECIAL IRRIGATION TAX
FIXED BY ACT 49 OF 1921.

Property No. 403

Owner

Plan: Mercedita, Fortuna, Juana Diaz

Russell & Co., S. en C.

Total No. of acres: 913.44.

Originally.

Name of the Estate: Fortuna

Situating in the Municipality of Juana Diaz

Ward: Sabana Llana

Boundaries

Representative

North: Lots No. 307-A, 335, 336, 334, 338,

340, 399, 402, 423, Jacaguas River.

South: Lots Nos. 404, 413, Jacaguas River.

East: Jacaguas River.

Originally

West: Lots Nos. 413, 414, 421 and 423.

Value in acre feet of the water right or concession: 3,306.45

Equivalent to an area of 826.61 acres

Taxes

Fiscal year	Receipt No.	Tax rate per acre	Tax per year	Surcharges to March 1930	Surcharges to June 30, 1930
1922-1923	14	2.9632113	2,449.42	1,065.50	1,102.24
1923-1924	14	3.26388946	2,697.96	1,011.74	1,052.21
1924-1925	14	3.307071	2,733.66	861.10	902.11
1925-1926	14	2.9930349	2,474.08	618.52	655.63
1926-1927	14	2.9953	2,475.96	482.81	519.95
1927-1928	13	3.14520045030	2,599.86	350.98	389.98
1928-1929	13	2.86472933	2,368.02	177.60	213.12
1929-1930	13	2.165053.484	1,789.66	22.37	49.22
1930-1931	13	2.37534827	1,963.32		
1931-1932	13	2.9589341473	2,445.88		
1932-1933	13	2.1253140829	1,756.80		
1933-1934	12	2.2317248948	1,844.76		
1934-1935	12				

Remarks: Tax \$19,588.62
 Surcharges to June 30, 1930 4,884.46
 Total \$24,473.08

Permanent Irrigation District

RETURN FOR PURPOSES OF LEVYING SPECIAL IRRIGATION TAX
 FIXED BY ACT 49 OF 1921.

Property No. 295.

Owner

Plan: Mercedesita, Fortuna, Juana Diaz

Russell & Co., S. en C.,

Total No. of acres: 914.97

Ponce, P. R., Originally.

Name of the Estate: Gristina

Situated in the Municipality of Juana Diaz

Ward: Amuelas

Boundaries

Representative

North: Jacaguas River, Lots Nos. 371-A,

374, 375, 377, P. & S.J. Road.

Originally.

South: Lot 366-A, Jacaguas River, Lots

291, 295-C, 296, 359, 364, 366.

East: Lots 294, 296-A, 317-A, 319-A, 323-A.

West: Jacaguas River, Lots 371, 383.

Value in acre feet of the water right or concession: 741.21

Equivalent to an area of 185.30 acres.

Taxes

Fiscal year	Receipt No.	Tax rate per acre	Tax per year	Surcharges to March 1930	Surcharges to June 30, 1930
1922-1923	12	2.9632113	549.08	238.85	247.09
1923-1924	12	3.26388946	604.80	226.80	235.87
1924-1925	12	3.307071	612.80	193.03	202.22
1925-1926	12	2.9930349	554.60	138.65	146.97
1926-1927	12	2.9953	555.04	108.24	116.57
1927-1928	11	3.14520045030	582.80	78.68	87.42
1928-1929	11	2.86472933	530.84	39.81	47.77
1929-1930	11	2.165053484	401.18	5.01	11.03
1930-1931	11	2.37514827	440.12		
1931-1932	11	2.9589341473	548.28		
1932-1933	11	2.1253140829	393.82		
1933-1934	10	2.2317248948	413.54		
1934-1935	10	2.			

Remarks: Tax \$4,391.14
 Surcharges to June 30, 1930 ... 1,094.94
 Total \$5,486.08

Permanent Irrigation District

RETURN FOR PURPOSES OF LEVYING SPECIAL IRRIGATION TAX
 FIXED BY ACT 49 OF 1921..

Property No. 403.

Owner

Plan: Mercedita, Fortuna, Juana Diaz

Russell & Co., S. en C.

Total No. of acres: 913.44

Originally.

Name of Estate: Fortuna

Situated in the Municipality of Juana Diaz

Ward: Sabana Llana

Boundaries

Representative

North: Lots 307-A, 335, 336, 334, 338,

339, 340, 391, 399, 402, 423.

Originally.

Jacaguas River.

South: Lots 404, 413 and Jacaguas River.

East: Jacaguas River.

West: Lots 413, 414, 421 and 423.

Value in acre feet of the water right or concession: 571.27

Equivalent to an area of 114.25 acres.

Taxes:

Fiscal year	Receipt No.	Tax rate per acre	Tax per year	Surcharges to March 1930	Surcharges to June 30, 1930
1922-1923	22	2.9632113	338.54	147.26	152.30
1923-1924	22	3.26388946	372.90	139.84	145.43
1924-1925	22	3.307071	377.84	119.02	124.69
1925-1926	22	2.9930349	341.96	85.49	90.62
1926-1927	22	2.9953	342.22	66.73	71.86
1927-1928	21	3.14520045030	359.34	48.51	53.89
1928-1929	21	2.86472933	327.30	24.55	29.45
1929-1930	21	2.165053484	247.36	3.09	6.80
1930-1931	13	2.37514827	1963.32		
1931-1932	13	2.9589341473	2443.88		
1932-1933	13	2.1253140829	1756.80		
1933-1934	12	2.2317248948	1844.76		

Plaintiff's Exhibit 4.

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Remarks: Tax	\$2,707.46
Surcharges to June 30, 1930 ...	675.04
	<hr/>
Total	\$3,382.50

(This lot belongs also to the third class.)

Permanent Irrigation District

RETURN FOR PURPOSES OF LEVYING SPECIAL IRRIGATION TAX
FIXED BY ACT 49 OF 1921.

Property No. 413.

Owner

Plan: Mercedita, Fortuna, Juana Diaz

Russell & Co., S. en C., Ponce
Originally.

Total No. of acres: 1,044.55

Name of the Estate: Union

Situated in the Municipality of Juana Diaz

Ward:

Boundaries

Representative

North: Lot 403, P. & G. road.

South: Caribbean Sea.

East: Lots 403, 404, Jacaguas River,
 Lots 407, 408, 409, 410 and 411.

West: Quabon River and lot 414.

Originally:

Value in acre feet of the water right or concession:	760.17
	186.38
	<hr/>
	946.55

Equivalent to an area of 152.03

37.27 189.30 acres.

Transcript of Record.

Taxes

Fiscal year	Receipt No.	Tax rate per acre	Tax per year	Surcharges to March 1930	Surcharges to June 30, 1930
1922-1923	23	2.9632113	560.92	244.01	252.42
1923-1924	23	3.26388946	617.86	231.69	240.96
1924-1925	23	3.307071	626.02	197.20	206.59
1925-1926	23	2.9930349	566.58	141.65	150.18
1926-1927	23	2.9953	567.02	110.57	119.07
1927-1928	22	3.14520045030	595.38	80.38	89.31
1928-1929	22	2.86472933	542.30	40.67	48.80
1929-1930	22	2.165053484	409.84	5.12	11.27
1930-1931	22	2.37514827	449.62		
1931-1932	22	2.9589341473	560.12		
1932-1933	22	2.1253140829	402.32		
1933-1934	21	2.2317248948	422.46		

Remarks:

(Two concessions for the same estate.)

Tax \$4,485.94

Surcharges to 6/30/30 1,118.57

Total \$5,604.51

Total tax \$49,918.56

Total surcharges 12,447.23

Grand Total \$62,365.79

Permanent Irrigation District

RETURN FOR PURPOSES OF LEVYING SPECIAL IRRIGATION TAX
FIXED BY ACT 49 OF 1921.

Property No. 309.

Owner

Plan: Mercedita, Fortuna, Juana Diaz

Russell & Co., S. en C.,

Total No. of acres: 558.69.

Originally.

Name of the Estate: Serrano.

Situated in the Municipality of Juana Diaz

Ward:

Boundaries

Representative

North: Lots 308 and 312.

Russell & Co., S. en C.,

South: Caribbean Sea.

Originally.

East: Lot 308.

West: Lots 308, 310, 311, 316.

Value in acre feet of the water right or concession: 2,379.83

Equivalent to an area of 475.97 acres.

Taxes.

Fiscal year	Receipt No.	Tax rate per acre	Tax per year	Surcharges to March 1930	Surcharges to June 30, 1930
1922-1923	19	2.9632113	1,410.40	613.52	634.67
1923-1924	19	3.26388946	1,553.52	582.57	605.88
1924-1925	19	3.307071	1,574.06	495.83	519.44
1925-1926	19	2.9930349	1,424.60	356.15	377.53
1926-1927	19	2.9953	1,425.68	278.01	299.40
1927-1928	18	3.14520045030	1,497.02	202.10	224.55
1928-1929	18	2.86472933	1,363.52	102.27	122.73
1929-1930	18	2.165053484	1,030.50	12.88	28.35
1930-1931	18	2.37514827	1,130.50		
1931-1932	18	2.9589341473	1,408.36		
1932-1933	18	2.1253140829	1,011.58		
1933-1934	17	2.2317248948	1,062.22		
1934-1935	17				

Remarks:

Tax	\$11,279.30
Surcharges to June 30, 1930	2,812.55
Total	<u>\$14,091.85</u>



DEFINITE CHART SHOWING THE DISTRIBUTION OF THE WATERS OF THE JALISCO RIVER, UNDER A FOUNTAIN RIGHT

Name of the Estates	Date of the Irrigation Concessions.	Total superficial area of the estates	Lands entitled to irrigation	Coefficient of liters per hectare adopted per second	Liters of water per second for the suspension of the irrigation Service.	Order Number
Fountain in the town of Juana Díaz						
Luciana	December 23, 1848	619.73	243.58	0.70	4.00	13
Cristina	March 17, 1851	784.00	308.14	0.70	82.24	5
Portuñal	May 8, 1841	794.00	312.07	0.70	106.74	4
	October 5, 1846				139.75	12
Totals	April 23, 1846	1,785.00	701.57	0.70	157.03	8
Amelia	June 21, 1859	1,378.77	541.91	0.70	205.80	6
Ursula	October 30, 1846	1,773.00	696.86	0.70	120.17	9
Unión	March 3, 1846	382.00	150.14	0.50	39.60	7
Serrano	July 28, 1855	257.60	219.15	0.50	102.47	10
	October 2, 1846			0.70	97.04	11
	September 26, 1845				133.28	
	May 14, 1845	878.84	345.41	0.50	62.79	3
Boca Chica	November 7, 1860				56.22	
San Fernando	March 7, 1867	75.54		0.70	52.88	1
Placeres	April 20, 1870	612.00	240.54	0.70	22.00	2
	By prescription, 1865				1166.30	

Madrid, June 8, 1860. Approved by H.M. = Sanchez Bustillo

True copy: Secretary of the General Government = Francisco Fontanals-Martínez

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CERTIFICATE.

I, Jose Morales Diaz, reporting stenographer of the District Court of San Juan, do hereby certify:

That the foregoing is a true and exact transcript of the evidence adduced by the parties herein; and also that I have delivered both to the appellant and appellee, in accordance with the law, a copy of the above transcript of the evidence.

San Juan, Puerto Rico, November 25, 1936.

J. MORALES DIAZ,

Reporting Stenographer.

(Filed with the clerk of the District Court: November 25, 1936.
P. M., Assistant Clerk.)

IN THE DISTRICT COURT FOR THE JUDICIAL DISTRICT OF
SAN JUAN, PUERTO RICO.

Civil No: 12,619.

The People of Puerto Rico, etc., Plaintiff,

v.

Russell & Co., S. en C., Defendant.

RECOVERY OF TAXES.

JUDGE'S APPROVAL OF THE TRANSCRIPT OF EVIDENCE.

I, Pablo Berga, District Judge for the Judicial District of San Juan, Puerto Rico, hereby certify:

That I presided over the hearing of this case and that the preceding transcript of evidence is a true and exact copy of the evidence adduced at the trial and that I approve the same for purposes of the appeal taken to the Supreme Court of Puerto Rico from the judgment rendered by this court.

San Juan, Puerto Rico, December 10, 1936.

PABLO BERGA,

District Judge.

IN THE SUPREME COURT OF PUERTO RICO.

7406

The People of Puerto Rico, Plaintiff and Appellant,

v.

Russell & Co., S. en C., Defendant and Appellee.

Appeal from the District Court of San Juan, P. R.

OPINION OF THE COURT

DELIVERED BY MR. JUSTICE WOLF.

San Juan, Puerto Rico, March 15, 1940.

In 1926 Russell & Co. filed a petition for an injunction to restrain the Treasurer of P. R. from collecting certain taxes. On March 4, 1927, Congress enacted that:

"Sec. 48. That the Supreme and District Courts of Porto Rico and the respective judges thereof may grant writs of habeas corpus in all cases in which the same are grantable by the judges of the District Courts of the United States, and the District Courts may grant writs of mandamus in all proper cases.

"That no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico." 44 Stats. 1418, 1421.

By a subsequent Act it further enacted that any tax which had been uncollected on account of injunction proceedings might be collected not by the summary administrative proceeding but a lawsuit. The Treasurer filed a complaint against Russell & Co. on June 24, 1930, to collect the tax, in the District Court of San Juan. The defendant moved for a change of venue and the cause was removed to the District Court of the United States on the ground of diverse citizenship. The case was tried therein and judgment was given for the defendant. The People of Puerto Rico, appealed to the Circuit Court of Appeals for the First Circuit which affirmed the Federal District Court. *People v. Have-*

meyer et al., 60 F. (2d) 10. The People went to the Supreme Court of the United States on certiorari and the Court reversed the Circuit Court of Appeals and the Federal District Court on the ground that there was no diversity of citizenship. *People of P. R. v. Russell & Co.*, 288 U.S. 476, 77 L. Ed. 903.

The case was remanded to the Territorial District Court. After the trial that court decided the case along the same lines that had been laid down by the Circuit Court of Appeals when it affirmed the Federal District Court. The People appealed in December 1935 but it was not until February 8, 1937, that the transcript of the record was filed. The parties filed their briefs on August 3, 1937, and May 2, 1938. A hearing was held on May 4, 1938, and a second hearing on November 22, 1939.

The facts of the case are as follows:

Russell & Co. is the owner in fee simple or the lessee of six large sugar cane plantations on the south side of the Island. To each of these plantations or estates certain water rights attach by virtue of concession from the Crown of Spain, the previous sovereign. These concessions consist of the right to take from the Jacaguas river certain quantities of water for irrigation purposes.

On September 18, 1908, the Legislature passed an Act to be found in Laws of 1909, page 152, creating an irrigation district on the south side of the Island, and that act established a complete system of irrigation to serve that district. By that act the landowners within the district would pay a certain tax on each acre of land. There was also a provision to acquire the water rights by condemnation, purchase, or exchange for credits against the tax, from the landowners as held such properties. By Act No. 128 of August 8, 1913, Special Session Laws, page 54, the Commissioner of the Interior was empowered among other things to contract with the owners of water rights who had not ceded, sold or otherwise transferred them to the irrigation district. On August 26, 1914, Russell & Co. and the owners of the estates which they hold in lease, executed contracts with the Commissioner of the Interior, whereby the concessions or water rights were suspended

and they agreed to receive from the irrigation system a certain quantity of water in exchange. On July 8, 1921, the Legislature passed Act No. 49, by which any land within the irrigation district which had not been subject to the tax was also made to respond. It is this tax that the plaintiff is trying to collect.

It should also be said that Russell & Co. is bound by its leases to pay all the taxes imposed upon the land which it holds by said leases, and if the tax is held constitutional it has to pay the tax upon every one of the six plantations.

The reasoning of the Circuit Court should be given careful attention but under the circumstances is not binding.

The defendant maintained that Act No. 49 of 1921 was void and unconstitutional and also that the action had prescribed. The lower court found the Act unconstitutional; following the Circuit Court of Appeals, *supra*; did not pass upon the question of prescription, but said by way of dictum:

However, we may say that if Act No. 49 of the Legislative Assembly of Puerto Rico, dated July 8, 1921, were valid and constitutional, the aforesaid Act No. 302 would only be applicable to the taxes whose collection had been stopped by an injunction pending on March 4, 1927, when the Act amending section 48 of the Organic Act was approved, but not to those imposed thereafter, and the amended complaint in this case includes the collection of taxes from the year 1922-1923 to 1933-34, both inclusive."

The appellant assigns three errors, as follows:

"The District Court of San Juan erred in declaring null and void Act No. 49 dated July 8, 1921, following the grounds of the judgment rendered by the Circuit Court of Appeals for the First Circuit of the United States (*People of Puerto Rico v. Havemeyer*, 60 F. (2d) p. 10) to wit:

"A. Because said Act delegates legislative powers to the Commissioner of the Interior in the part that refers to the

imposition of the special tax which the Act provides upon the lands which receive the benefits of the irrigation system.

"B. Because it impairs the value of the obligations arisen from the contracts executed on August 26, 1914, between the People of Puerto Rico and the defendant or its predecessors in title.

"2. The District Court of San Juan erred in deciding that the imposition of the assessment or special tax is not justified while the contracts established in deed No. 20 dated June 8, 1916, executed before the Notary Frank Antonsanti, are in force, and the water rights granted by the Crown of Spain to the defendant or its predecessors in title are not renounced, abandoned, relinquished or condemned.

"3. The District Court of San Juan erred in not ordering the defendant to pay the amount of the special tax which the complaint seeks to collect."

The three errors will now be considered.

As to the undue delegation of powers, we think that there is none. The Commissioner of the Interior fixes the water charges each year by performing a definite calculation. Even if the statute did not so specifically determine the computation of the charges we would not hold it an undue delegation of powers.

"The Courts have upheld the validity of statutes authorizing irrigation districts and other districts organized for the same purpose, to levy taxes and assessments, and such statutes do not fall within constitutional provisions regulating assessment and collection of taxes for general state purposes." 67 C. J. 1337, par. 925.

The text is supported by *Fallbrook Irr. Dist. v. Bradley*, 17 Sup. Ct. 56, 164 U.S. 112, 41 L. Ed. 369; *Turlock Irr. Dist. v. Williams*, 79 Cal. 360, 18 P. 379.

Title 43 of the Code of Laws of the United States is entitled "Public Lands". Chapter 12 of that title bears the name "Reclamation and Irrigation of Lands by Federal Government" and

is known as the "Reclamation Law". It contains provisions like the following:

"Sec. 373. The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this chapter into full force and effect.

"Sec. 374. Whenever in the opinion of the Secretary of the Interior any lands . . . are not needed . . . said Secretary of the Interior may cause said lands . . . to be appraised . . . and . . . to sell the same . . .

" . . . the Secretary of the Interior is authorized . . . to convey all the right title and interest of the United States of, in, and to said lands . . . subject however to such reservations, limitations or conditions as said Secretary may deem proper . . ."

The Secretary is given absolute power to determine whether the owners of land within an irrigation district may retain their land or must dispose of it.

Section 418 says:

"Before any contract is let or work begun for the construction of any reclamation project adopted after August 13, 1914, the Secretary of the Interior shall require the owners of private lands thereunder to agree to dispose of all lands in excess of the area which he shall deem sufficient for the support of a family upon the land in question, upon such terms and at not to exceed such price as the Secretary of the Interior may designate; and if any landowner shall refuse to agree to the requirements fixed by the Secretary of the Interior, his land shall not be included within the project if adopted for construction."

Absolute power is also given to the Secretary to determine "the charges which shall be made per acre . . . upon lands in private ownership which may be irrigated by the waters of the said irri-

gation project, and the number of annual installments in which such charges shall be paid and the time when such payments shall commence." Sec. 419.

Section 462 also provides for the payment of maintenance charges.

In a great number of cases the reclamation Act has been brought before the courts and its provisions have been upheld. In no case has it been attacked because it unduly delegates legislative powers to the Secretary of the Interior; but the acts of the Secretary have been repeatedly affirmed as within the scope of his powers.

In *Swigart v. Baker*, 229 U.S. 187, it was held that the Secretary of the Interior of the United States was authorized to assess cost of maintenance as well as of construction by the Reclamation Act of 1902 (32 Stat. 388, 1093) even though the act only says that the Secretary may assess "the cost of construction of the project". The court said:

"... The phrase is not expressly defined and being general in its terms is not necessarily limited to building, but may include the preservation and maintenance of what has been built."

The cases decided by the Supreme Court of Puerto Rico on the question of delegation of powers have been very few. *People v. Neagle*, 21 P.R.R. 339; *People v. Ramirez*, 42 P.R.R. 77; *Feliciano v. Lopez*, 44 P.R.R. 911; *People v. White Star Bus Line, Inc.*, 45 P.R.R. 153; *M. Taboada and Co. v. Rivera Martinez, Commissioner of Labor*, 51 P.R.R. —, and *Sifre v. Pellon*, 54 P.R.R. 559. Of these, only the first has any bearing.

The *Neagle* case involved the constitutionality of a statute (Act of August 12, 1913, Laws of Special Session of 1913, p. 90, Act No. 134) which gave authority to the Treasurer of Puerto Rico to classify the different businesses into classes.

We copy from the opinion:

"The respondent admits that legislatures may adopt pri-

mary standards and leave to administrative officials the duty of filling in details so as to make the law operative. He submits, however, that the Legislature of Puerto Rico has not set a primary standard within the meaning of the decisions which the Government in its brief relies on. We shall give a resume of these decisions."

After a study of the authorities the court said:

"We cannot see that it makes any difference that the Treasurer is given a wide discretion provided that his powers are administrative rather than legislative. The question always remains, under the words of the statute and the legislative history of the country, whether the powers conferred have been recognized as administrative rather than legislative. A specific case has been found in *Ould & Carrington, supra*. The respondent does not attempt to distinguish the case, but he attacks the reasoning. The reasoning may not be entirely satisfactory but the judgment remains a fact, and a court of the United States has decided that similar powers to those conferred by Act No. 134 upon the Treasurer of Porto Rico are administrative rather than legislative."

In the case at bar we find that the courts of other jurisdictions have held valid statutes of the same nature as the one in issue. The ample powers of the Secretary of the Interior of the United States have been broadened by judicial interpretation (*Swigart v. Baker, supra*).

In the opinion rendered in the *Neagle* case, *supra*, several cases are cited and the case of *Chicago and Northwestern Railway Co. v. Day*, 35 Fed. 874, is copied in part. All these cases tend to support the contention that in this case, as in that of *Neagle*, the delegation was of administrative rather than of legislative powers.

As we shall see later from the act itself, what the Commissioner does is to fill in details. We copy from the opinion of the Circuit Court of Appeals:

"In determining the amount to be raised, the Treasurer of Porto Rico is directed to take the amount estimated by the Commissioner of the Interior to defray the cost of operation and maintenance of the irrigation system for the following fiscal year (the estimate of the commissioner to be made and certified as provided in section 11 of Act No. 128 of August 8, 1913), and add to this estimated amount or subtract therefrom, as the case may be, any resulting deficit below or surplus above the amount expended for operation and maintenance of the system the preceding year. The treasurer is then to divide the amount so determined by the total number of acres (arrived at as prescribed in the act) to get the tax rate per acre to be levied during the subsequent fiscal year on lands outside the district which are not subject to a tax to meet the cost of the system.

"The provision complained of in section 2 of Act No. 49 as delegating legislative power is the one requiring the treasurer in ascertaining the rate for assessing the tax to take the amount estimated or certified to as estimated by the Commissioner of the Interior for defraying the cost of operation and maintenance of the irrigation system during the following fiscal year. The contention is that the Legislature could levy and authorize the assessment of the tax in either one of two ways. It could itself fix a flat rate at which the receivers of water could be taxed per acre foot, or it could itself determine the amount of money to be raised for the ensuing year to defray the expenses of maintenance and operation, but that it could not delegate the determination of that amount, and thereby the rate, to the discretion of the Commissioner of the Interior; that the determination of the amount to be raised or the rate is a legislative matter involving discretion, which the legislature cannot delegate to administrative officers.

"Counsel for the plaintiff, however, contend that the determination of the *amount to be raised* for an ensuing year is

a pure matter of computation, and that the act has pointed out how that computation shall be made." *People v. Havemeyer, supra.*

If the estimate is too high or too low, a surplus or a deficit will result. A surplus will be credited to the budget of the following year, thereby reducing the tax; a deficit will be added to the budget of the following year. Thus, any error committed by the commissioner will be automatically corrected when the next budget is prepared. It will be seen that the Commissioner's discretion does not play an important part in the computation of the tax. Indeed, the commissioner's role could be eliminated and the cost of maintenance estimated some other way. For example, the budget of a previous year to be taken as tentative for the following one. Such a procedure is followed in estimating the premium rates for the State Insurance Fund.

The landowner pays the tax in the computation of which the commissioner's report is used. But since any difference between that estimate and the real cost of maintenance is adjusted the landowner is really paying for the exact cost of maintenance.

Furthermore, it has not been charged, or even suggested that the commissioner's estimates are unjust, or confiscatory.

We hold, therefore, that the act contains no undue delegation of powers.

As to the other contention, that the contracts are impaired, we also think it is without merit.

The contracts do not say that the People of Puerto Rico bind themselves not to impose taxes. Indeed, even if a clause like that had been included, we apprehend it would have been void.

Another point that the appellant makes is that the appellee failed to prove its concessions in the lower court. While it is true, as the appellee says that the appellant accepted and admitted that said concessions existed, nothing has been brought before this or any of the other courts which have passed on this case to show that a tax exemption was attached to them. As far as the records

goes, these concessions are ordinary water concessions, like a number of others granted to landowners in this Island and Spain. The only provision of which we know in regard to taxes was a section in the primitive Law of Waters by which the Crown bound itself not to raise the taxes on the lands benefited by the concession during a ten-year period.

The appellee's case might be strengthened if the tax imposed—charges for the maintenance of the system—were considered as a payment for the water received by the landowners from the irrigation system. It could then be said that the appellee does not have to buy water and therefore it should not pay for any. But the theory is different. We copy from *Corpus Juris*:

"While it has been broadly stated that the benefit to the land is not the source of the power to tax it for irrigation purposes, generally speaking, the justification and authority for the levying of assessments or taxes in the nature of assessments by an irrigation or similar district is derived from the benefits which the expenditure of the tax or assessment confers on the owners of land within the district, and a tax or assessment without supporting benefit, or out of all proportion to the benefits conferred, as where the assessment is based on an acreage in excess of that owned, can not be sustained although the fact that there is no benefit sufficient to support the whole assessment will not relieve the landowner from the duty to pay such portion of the assessment as is supported by a benefit." 67 C. J. 1341, par. 932.

The text is supported by *In Re Madera Irr. Dist.*, 92 Cal. 296, 28 P. 272, 275, 14 L.R.A. 755; *American Falls Reservoir Co. v. Thrall*, 39 Ida. 105, 228 P. 236; *Cosman v. Chestnut Valley Irr. Dist.*, 74 Mont. 111, 238 P. 879, 40 A.L.R. 1344.

"Broadly speaking, the word 'benefit' as used in a statutory provision requiring assessments to be proportionate to benefits received, will be construed as meaning such benefits as promote the prosperity of the district and add to property

values. Generally speaking, the theory of assessment for benefits is that the landowner has received by reason of the irrigation system an increase in the market value of his property and that increase marks the extent of the benefit, although there is authority holding that the market value of lands within an irrigation district is not conclusive on the question of benefits equaling assessments, and that there may be an actual benefit without proof of a corresponding increase in market value." 67 C. J. 1347, par. 945.

The text is supported by *Colburn v. Wilson*, 24 Ida. 94, 132 P. 579; *Union Trust Co. v. Carnhope Irr. Dist.*, 132 Wash. 538; 232 P. 341; *In re Goshen Irr. Dist.*, 42 Wyo. 229, 293 P. 373.

That the assessments need not be equivalent to the water used by the landowner has been repeatedly held.

... the owner of irrigable land within a district must respond to the annual assessment for the operation and maintenance of the system, where the water is made available for his use, even though he does not use it." *Otis Orchards Co. v. Otis Orchards Irr. Dist.*, No. 1, 124 Wash. 210, 215 P. 24, 25.

In *Nampa & Meridian Irr. Dist. v. Petrie*, 28 Ida. 227, 153 P. 425, 429, the Supreme Court of Idaho held valid a provision granting water rights to landowners for only 160 acres while subjecting their entire acreage to district assessments according to benefits. This case was followed in *Saylor v. Gray*, 41 Ariz. 558, 20 P. (2d) 441.

Similarly:

"A landowner is not entitled to exclusion of his land from an irrigation district for the sole reason that such land has an individual water right. Such tract of land would be benefited from the ability of the irrigation district to furnish water in times of emergency, to supply better or cheaper service, and to furnish electric energy or domestic water."

Bleakly v. Priest Rapids Irr. Dist., 168 Wash. 267, 11 P. (2d) 597.

Of all the cases studied, the one which most resembles the one at bar is *Knowles v. New Sweden Irrigation District*, 16 Idaho 217, 101 Pac. 81. The facts there are as follows: A man named Scott purchased, for \$1,800 a water right from the Great Western Canal Company (a private concern) whereby he received 250 inches of water per second for which he paid a certain rental every year. Subsequently the New Sweden Irrigation District was organized under the provisions of an act of the state legislature. The Irrigation District purchased the Great Western Canal Construction Company. Scott sold his land to Knowles. The Board of Directors of the Irrigation District levied an assessment on all lands included in the district and among them Knowles, to pay interest and reduce the principal on certain bonds which had been issued in payment of the Great Western Canal Company. Knowles paid under protest and brought action to recover and to enjoin the district from levying any more assessments on his land. The Supreme Court of Idaho said:

"Now it is clear to us that for the purchase of this system respondent could not legally and lawfully assess appellant's property until such time as it had either purchased or acquired his water right and privileges and reduced him to a common level and placed him on a common footing with other landowners and water consumers in the district."

The court found for the plaintiff. On rehearing, however, the court reversed itself, and said:

"Under our irrigation law as it existed at the time of the organization of this District and the assessments referred to were made, if the land of the plaintiff was properly included in said irrigation district, it was subject to assessment for benefits, provided it received any, whether the owner of said land owned a water right in connection therewith or not, for a person in an irrigation district may receive certain

benefits, regardless of whether the owner has a water right in connection therewith or not."

And later on it says:

"In *Fallbrook Irr. Dist. v. Bradley*, 164 U.S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369, the Supreme Court of the United States had under consideration some of the questions involved in this case, and it was there held that land, which can be used beneficially to a certain extent without irrigation, may be so improved by it that such land can properly be included in an irrigation district and assessed for the benefit of the artificial irrigation as a public improvement, and that under the Wright irrigation law of California, the board is required to hear the petition for the organization of the district upon a notice and must not include land which will not be benefited; that it necessarily follows that a person interested has a right to appear before the board and contest the facts upon which the petition is based and, as to the benefits to any particular tract of land included in the proposed district. In referring to the power of the Legislature to constitute taxing districts, the court said: 'It has been held in this court that the Legislature has power to fix such a district for itself without any hearing as to the benefits, for the purpose of assessing upon the lands within the district the cost of a local public improvement. The Legislature, when it fixes the district itself, is supposed to have made proper inquiry and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question.'"

And later the court said:

"In *Pioneer Irrigation District v. Bradley*, 8 Idaho 310, 68 Pac. 295, 101 Am. St. Rep. 201, this court held the irrigation district act now under consideration constitutional. This case in no manner involves the taking of private prop-

erty without due process of law, nor the violation of the obligation of a contract. The only question involved under the issues is the validity of certain assessments made against the lands of the plaintiff."

In that case the Idaho court held that the benefit received by a landowner who possessed a water right was enough to make him liable to assessments in the same degree as other landowners.

In Puerto Rico the legislature apparently, by its enactments, considers the benefits of landowners who have no water rights, or who had them but relinquished them, are greater than the benefits received by landowners who are in the appellee's position.

Consequently the former have to pay construction charges, as well as maintenance. The statute provides:

"Section 11. The amount that shall be assessed and levied upon a given tract of land included in the permanent irrigation district shall be determined as follows:

"The Treasurer of Porto Rico shall calculate the amount of the interest and principal or sinking fund due upon outstanding irrigation bonds for the ensuing fiscal year, and shall add thereto the total amount due upon credits for the ensuing year on account of water rights or concessions; and shall further add thereto the amount estimated and certified as estimated to him by the Commissioner of the Interior for the cost of operation and maintenance of the irrigation system, for the said ensuing fiscal year. He shall then either add to or subtract from the amount so obtained the estimated amount of any deficit or surplus, as the case may be, existing in connection with the Irrigation Fund from the operations of the current fiscal year. From this amount he shall subtract the amount estimated and certified as estimated to him by the Commissioner of the Interior as the receipts for the ensuing fiscal year from any water power developed in connection with the irrigation system (until such time as the total bonded indebtedness incurred on ac-

count of the irrigation system shall have been paid in full); and the amount estimated and certified as estimated to him by the Commissioner of the Interior as receipts for the ensuing fiscal year from any other sources except from the issues of bonds and from special assessments herein provided for to be levied upon the land in the permanent irrigation district. To the amount so determined the Treasurer shall add an amount equivalent to two per centum of the total as a margin of safety for delayed collections, and the amount thus determined by the Treasurer of Porto Rico, subject to the limitations and provisions hereinafter set forth, shall be and constitute the total sum assessed for the said fiscal year, and the same shall be levied upon the lands at the time included in the permanent irrigation district (including any lands owned by The People of Porto Rico which form part of the said district, which lands shall be liable for and pay taxes levied hereunder in the same manner as the other lands included in the said irrigation district); . . ." (Act No. 128 of 1913 (2), p. 67.)

The lands of the appellee are included in subdivision 4 of section 2 of the Act (Act No. 49 of 1921, Session Laws, p. 367). It reads:

"Section 2. That the tax to be levied on each tract of land receiving water from the irrigation system, but which under the law in force does not contribute towards defraying the cost of such system, shall be classified as follows: The Treasurer of Porto Rico shall have charge of fixing the total number of acres receiving water from the irrigation system which includes . . . (4) parcels of land irrigated by water supplied because of acquired rights or concessions which have not been assigned, which said water, pursuant to the terms of the contracts entered into with the Commissioner of the Interior or under decisions of the Irrigation Commission, is taken and measured in the rivers at the points of

intake indicated in the said concessions; and such tracts shall be determined by dividing the value of the said concessions in acre-feet per year, as the same may be or as shall have been fixed by the Commissioner of the Interior, by the Irrigation Commission or by decision of the courts in cases of appeal, by five. The Treasurer of Porto Rico shall then take amount estimated or certified to as estimated by the Commissioner of the Interior for defraying the cost of operations and maintenance of the irrigation system during the following fiscal year (as provided under section 11 of Act 128, approved August 8, 1913, which amends the Irrigation Law approved September 18, 1908), and shall add thereto or subtract therefrom, as the case may be, any resulting deficit between or surplus over, the amount expended and certified to as expended by the Commissioner of the Interior for expenses of operation and maintenance of the irrigation system during the preceding fiscal year, and the amount estimated or certified to as estimated by the Commissioner of the Interior for defraying the cost of operation and maintenance of the irrigation system during the aforesaid preceding fiscal year. The Treasurer shall then divide the amount so determined by the total number of acres computed as hereinbefore provided, and the result shall be and shall constitute the tax per acre which shall be levied during said subsequent fiscal year on all tracts supplied with water from the southern coast public irrigation system, and which in no other manner are subject to the payment of a tax to meet the cost of the said irrigation system. . . ."

Finally, to support the constitutionality of the Act we may cite from the opinion of the Supreme Court of the United States in *Fallbrook Irr. Dist. v. Bradley*, 164 U.S. 112, 176:

" . . . Assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received, and

that no land ought in justice to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry. Some means of arriving at this amount must be used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made, and where the fact of some benefit accruing to all the lands has been legally found, can it be that the adoption of an *ad valorem* method of assessing the lands is to be held a violation of the Federal Constitution? It seems to us clearly not. It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discretion of the state legislature, and with which this court ought to have nothing to do. The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem and far from a case of taking property without due process of law."

At page 174:

"In the act under consideration, however, the establishment of its boundaries and the purposes for which the district is created, if it be finally organized by reason of the approving vote of the people, will almost necessarily be followed by and result in an assessment upon all the lands included within the boundaries of the district. The legislature thus in substance provides for the creation not alone of a public corporation, but of a taxing district whose boundaries are fixed, not by the legislature, but after a hearing, by the board of supervisors, subject to the final approval by the people in an election called for that purpose. It has been held in this Court that the legislature has power to fix such a district for itself without any hearing as to benefits.

for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, i.e., the amount of the tax which he is to pay. *Paulsen v. Portland*, 149 U.S. 30, 41. But when as in this case the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited, and the decision of that question is submitted to some tribunal (the board of supervisors in this case), the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited. Unless the legislature decide the question of benefits itself, the landowner has the right to be heard upon that question before his property can be taken. This, in substance, was determined by the decisions of this court in *Spencer v. Merchant*, 125 U.S. 345, 356, and *Walston v. Nevin*, 128 U.S. 578. Such a hearing upon notice is duly provided for in the act."

At page 177:

"In the case of *Davidson v. New Orleans*, *supra*, the assessment, with which this court refused to interfere, was for a local improvement (reclaiming swamp lands), and by sec. 8 of the act of the Legislature of Louisiana, passed in 1858, Laws of Louisiana, 1858, 114, such an uniform assessment was levied upon the superficial or square foot of lands situate within the draining section or district of such board

as would pay for the cost of construction. The effect of this provision was that each foot of land in the whole district paid the same sum as any other foot, although the assessment was founded upon the theory of an assessment for benefits. It was complained that the amount assessed upon plaintiff's lands was excessive, and that part of them received no benefit at all, and it was to that argument that the reply was made that it was a matter of detail so far as this court was concerned, *i.e.*, it was not a constitutional question, and therefore was not reviewable here. 96 U.S. at page 106.

"In *Walston v. Nevin*, 128 U.S. 578, an assessment was laid upon lands for benefits received from construction of a local improvement, according to the number of square feet owned by the landowner. It was urged that it was not an assessment governed by the amount of benefits received, but was an absolutely arbitrary and illegal method of assessment. This court held the objection not well founded and that the matter was for the decision of the legislature, to which body the discretion was committed of providing for payment of the improvement.

"We refer to the case of *Cleveland v. Tripp*, 13 R.I. 59, decided in 1880, as one which treats this subject with much ability. The act provided for the construction of a sewer in the city of Providence and directed the laying of an assessment upon the abutting land of a certain sum for each front foot and another sum for each square foot extending back 150 feet. The claim was made that such a mode of assessment did not apply the tax in proportion to the benefits received, and was unequal and unfair, and therefore unconstitutional. The court, while admitting the complaints of inequality to be well founded, yet held the act to be within the power of the legislature.

"There are some States where assessments under such circumstances as here exist and made upon an *ad valorem* basis

have been held invalid, as an infringement of some provision of the state constitution, or in violation of the act under which they were levied. Counsel have cited several such in the briefs herein filed. We do not discover, and our attention has not been called to any case in this court where such an assessment has been held to violate any provision of the Federal Constitution. If it do not, this court can grant no relief.

The method of assessment here provided for may not be the best which would have been adopted in order to accomplish the most equal and exact justice which the nature of the case permits. But none the less we are unable to say that it runs counter to any provision of the Federal Constitution, and we must for that reason hold the objection here considered to be untenable.

An objection is also urged that it is delegating to others a legislative right, that of the incorporating of public corporations, inasmuch as the act vests in the supervisors and the people the right to say whether such a corporation shall be created, and it is said that the legislature cannot so delegate its power, and that any act performed by such a corporation by means of which the property of the citizen is taken from him, either by the right of eminent domain or by assessment, results in taking such property without due process of law.

We do not think there is any validity to the argument. The legislature delegates no power. It enacts conditions upon the performance of which the corporation shall be regarded as organized with the powers mentioned and described in the act.

After careful scrutiny of the objections to this act we are compelled to the conclusion that no one of such objections is well taken. The judgment appealed from herein is therefore reversed and the cause remanded to the Circuit Court of the United States for the Southern District of California for further proceedings not inconsistent with this opinion."

The plea of prescription raised by the defendant should be carefully considered. The district court did not pass upon it except as has been noted.

The Treasurer tried to collect the tax. Russell & Co. filed a petition for a writ of injunction before the United States District Court of Puerto Rico. The case had been appealed to the Circuit Court of Appeals when Congress on March 4, 1927, amended section 48 of the Organic Act, and forbade the issuance of writs to enjoin collection of taxes. The proceeding pending in the Circuit Court of Appeals was dismissed—*Gallardo v. Havemeyer*, 21 F. (2d) 1012—on November 3, 1927.

On April 23, 1928, Congress passed Act No. 302, which provided that all taxes which had been subject to injunction proceedings should be collected "by a suit at law instead of by attachment, embargo, distraint, or any other form of summary administrative proceeding. Notwithstanding the provisions of any existing statute of limitations any such suit may be instituted at any time not later than one year after the approval of this act."

This last sentence does not mean, as the appellee contends, that the suits had to be filed before April 23, 1929. The effect of the statute was to grant an extra term of one year to the Treasurer to collect by a suit taxes which under the ordinary statutes had prescribed by reason of the injunction proceeding.

The Act which establishes the special tax has no provision similar to the Income Tax Act, and others, providing that the Treasurer has to collect within a certain time. If Congress had not granted that year of grace to the Treasurer he might have been unable to collect some other taxes, but not this one.

We hold, therefore, that the action had not prescribed.

The judgment of the District Court of San Juan should be reversed and in lieu thereof a new one entered, ordering Russell & Co. to pay to the plaintiff the sums specified in the complaint.

ADOLPH G. WOEF,

Associate Justice.

[The same title.]

JUDGMENT.

San Juan, Puerto Rico, March 15, 1940.

For the reasons stated in the foregoing opinion the judgment appealed from rendered by the District Court of San Juan in the above-entitled case, on November 25, 1935, is hereby reversed, and in lieu thereof, this court renders another judgment ordering, as it hereby orders, that Russell & Co., S. en C., pay to the plaintiff the sum of \$61,617.04, with interest from and after June 24, 1930, on which date the original complaint was filed, plus the sum of \$36,051.84, with interest from June 8, 1934, date on which the amended complaint was filed; without special pronouncement of costs and attorneys' fees.

It was so decreed and ordered by the court as witness the signature of the Chief Justice. Mr. Justice De Jesus took no part in the decision of this case inasmuch as he, as district judge, decided a demurrer sustaining the sufficiency of the complaint.

EMILIO DEL TORO,

*Chief Justice.*Attest: JOAQUIN LOPEZ, *Secretary-Reporter.*

[MEMORANDUM. Petition for appeal filed April 22, 1940; order allowing appeal, dated May 7, 1940; and citation, dated May 8, 1940, are here omitted. A. I. CHARRON, *Clerk.*]

[The same title.]

ASSIGNMENT OF ERRORS.

Now comes Russell & Company, S. en C., and files the following assignment of errors, upon which it will rely in the prosecution of the appeal herewith petitioned for in this cause from the judgment of the Supreme Court of Puerto Rico entered March 15, 1940, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of Puerto Rico in the above-entitled case, there is manifest error, to wit:

1. The court erred in holding that Act No. 49 of the Legislature of Puerto Rico approved July 8, 1921, and the enforcement thereof by plaintiff did not impair obligations of the contracts entered into on August 26, 1914, between The People of Puerto Rico and the predecessors in right or title of defendant.

2. The court erred in holding that Act. No. 49 of the Legislature of Puerto Rico approved July 8, 1921, and the provisions for ascertaining and fixing the amount of the tax therein contained did not illegally delegate legislative powers to the Commissioner of the Interior of Puerto Rico.

3. The court erred in holding that the tax herein sought to be enforced had not prescribed under the provisions of the Act of Congress of April 23, 1928 (Public No. 302, 70th Congress).

4. The court erred in failing and refusing to hold that Act No. 49 of the Legislature of Puerto Rico approved July 8, 1921, and the enforcement of the same against defendant violates Section 2 of the Organic Act of Puerto Rico in that paragraph which provides that the rule of taxation in Puerto Rico shall be uniform (48 U.S.C.A. 737; 39 Stat. 951).

5. The court erred in failing and refusing to hold that the provisions of Act No. 49 of the Legislature of Puerto Rico approved July 8, 1921, is void as impairing the obligations of the two contracts entered into on August 26, 1914, between The People of Puerto Rico on the one hand and Fortuna estates in one contract and Jose A. Poventud, Isabela Cortada Vda. de Poventud, Juan Torruella y Cortada and Sergio Torruella in the second contract (Exhibits A and B to the answer).

6. The court erred in holding or implying that defendant received special benefits by reason of the construction and operation of the irrigation system, which may form a basis for the tax imposed by Act No. 49 of 1921.

7. The court erred in failing and refusing to hold that the operation of Act. No. 49 of the Legislature of Puerto Rico approved July 8, 1921, deprives defendant of its property and property rights without due process of law.

8. The court erred in failing and refusing to hold that Act No. 49 of the Legislature of Puerto Rico approved July 8, 1921, violates the Treaty of Paris between the United States and the Kingdom of Spain of April 11, 1899, Articles VIII and IX, in that said Act impairs and destroys property rights of the defendant granted to defendant's predecessors in right and title by the Government of Spain and which were valid, subsistent rights at the time the Treaty of Paris was ratified by the United States.

9. The court erred in failing and refusing to hold that Act No. 49 of the Legislature of Puerto Rico approved July 8, 1921, violated the provisions of Section 2 of the Organic Act of Puerto Rico guaranteeing the equal protection of the laws in that it attempts to impose a tax on a limited class without any corresponding benefits.

10. The court erred in holding that a special tax or assessment as provided in Act No. 49 of the Legislature of Puerto Rico approved July 8, 1921, can be imposed upon a limited class of lands not included in the irrigation district.

11. The court erred in failing and refusing to hold that Act No. 49 of the Legislature of Puerto Rico approved July 8, 1921, is void and of no effect in its taxing provisions for the reason that the person taxed or assessed is given no right nor opportunity of a hearing upon the question of the apportionment of the burden, before the tax or assessment becomes fixed.

12. The court erred in holding valid the tax on defendant's lands under Act No. 49 of the Legislature of Puerto Rico approved July 8, 1921, while the contracts of August 26, 1914, between The People of Puerto Rico and defendant's predecessors in title and right were in force and while the water rights granted to defendant's predecessors by the Crown of Spain had never been renounced, abandoned, relinquished or expropriated.

13. The court erred in holding that the Government of Puerto Rico was not bound under the contracts of August 26, 1914, between The People of Puerto Rico and defendant's predecessors in title and right not to impose irrigation taxes upon lands to

which there were appurtenant water rights or concessions and for which water rights and concessions the Commissioner of the Interior of Puerto Rico was authorized to negotiate contracts under Section 13 of Act No. 128 approved August 8, 1913, by which the owners of such water rights and concessions would receive the reasonable equivalent in value for the suspension of their rights.

14. The court erred in refusing to give consideration to the decision of the Circuit Court of Appeals of the United States for the First Circuit in the case of *People of Puerto Rico v. Havemayer*, 60 Fed. (2d) 10.

15. The court erred in rendering judgment for the plaintiff and against the defendant, for other errors apparent in the record.

Wherefore, defendant prays that the judgment herein rendered by the Supreme Court of Puerto Rico be reversed with costs.

San Juan, Puerto Rico, April 22, 1940.

R. CASTRO FERNANDEZ,

Attorney for Defendant-Appellee.

STIPULATION *re* SUPERSEDEAS AND COST BONDS.

[Filed in the Supreme Court May 13, 1940.]

Whereas on March 15, 1940, the Supreme Court of Puerto Rico entered judgment in the above-entitled case ordering the defendant, Russell & Co., S. en C., to pay to the plaintiff, The People of Puerto Rico, the sum of sixty-one thousand, six hundred seventeen dollars, four cents (\$61,617.04) with interest from June 24, 1930, plus the sum of thirty-six thousand, fifty-one dollars, eighty-four cents (\$36,051.84) with interest from June 8, 1934;

Whereas on April 22, 1940, the defendant, Russell & Co., S. en C., filed before said court a petition for appeal from said judgment to the United States Circuit Court of Appeals for the First Circuit, and on May 7, 1940, the Supreme Court of Puerto Rico entered the following order:

"Considering the foregoing petition, it is ordered by the Chief Justice of the Supreme Court of Puerto Rico that an appeal be allowed to Russell & Company, S. en C., defendant and appellee in the above-entitled case, from the judgment rendered by this court on March 15, 1940; that the said appeal be granted to the United States Circuit Court of Appeals for the First Circuit; that the defendant and appellee be required to give a supersedeas bond of \$140,000 and a cost bond of \$300; and that a transcript of the record and proceedings herein, including copy of the petition for appeal, of this order granting the appeal and of the appeal bond, be filed in the United States Circuit Court of Appeals for the First Circuit, for which the defendant is allowed sixty days."

Whereas, the defendant herein offered the plaintiff in this action to deposit in escrow with the National City Bank of New York, San Juan Branch, the sum of one hundred forty thousand three hundred dollars (\$140,300) subject to the final outcome of this case, and such deposit is considered by the plaintiff herein as a good and sufficient security to comply with the supersedeas and cost bonds required by the Supreme Court of Puerto Rico in this case;

Whereas, said amount has been deposited by defendant in escrow with the said National City Bank of New York, San Juan Branch, as appears from the escrow agreement, a duplicate of which is hereto attached, marked "Exhibit A".

Now, therefore, the plaintiff and defendant in this case stipulate and agree that the amount so deposited be considered as a good and sufficient supersedeas and cost bond as required by the Supreme Court of Puerto Rico in the above-transcribed order of May 7, 1940, and both parties respectfully pray that the attached

escrow agreement be approved by this Honorable court as a good and sufficient supersedeas and cost bond in this case.

San Juan, Puerto Rico, May 13, 1940.

R. CASTRO FERNANDEZ,

Attorney for Defendant.

GEORGE A. MALCOLM, *Attorney General,*

by C. H. JULIA,

Assistant Attorney General,

Attorney for Plaintiff.

— ESCROW AGREEMENT.

[Filed in the Supreme Court May 13, 1940.]

This agreement made in the City of San Juan, Island of Puerto Rico on the 13th day of May, 1940

between

Russell & Co. Sucrs., a civil agricultural partnership duly organized and existing in accordance with the laws of this Island, with principal office in the City of Ponce, P. R., hereinafter called the party of the first part, and

The National City Bank of New York, San Juan Branch, a national banking association organized in accordance with the law of Congress of the United States, with principal office in the City and State of New York

Witnesseth,

Whereas on March 15, 1940 the Supreme Court of Puerto Rico in the case No. 7466 entitled, The People of Puerto Rico, plaintiff, vs. Russell & Co., S. en C., defendant, entered judgment ordering the defendant Russell & Co. S. en C., to pay to the plaintiff, The People of Puerto Rico, the sum of Sixty One Thousand Six Hundred Seventeen Dollars, Four Cents (\$61,617.04) with interest from June 24, 1930 plus the sum of Thirty-Six Thousand Fifty-One Dollars, Eighty-Four Cents (\$36,051.84) with interest from June 8, 1934, without costs;

Whereas on April 22, 1940 the defendant Russell & Co., S. en

C. filed before said Court a petition for appeal from said judgment to the United States Circuit Court of Appeals for the First Circuit, and on May 7, 1940 said Supreme Court entered an order allowing the appeal and requiring the said defendant to give a supersedeas bond of One Hundred Forty Thousand Dollars (\$140,000) and a cost bond of Three Hundred Dollars (\$300);

Whereas the party of the first part has agreed with the Attorney General of Puerto Rico, as attorney for the People of Puerto Rico, to deposit in escrow with the party of the second part, the sum of One Hundred Forty Thousand Three Hundred Dollars (\$140,300) subject to the final outcome of said suit, said deposit to be considered as a good and sufficient supersedeas and cost bond in said case;

Now, Therefore, in consideration of the premises, it is mutually agreed by the parties herein as follows:

1. Russell & Co., Sucrs., party of the first part, deposits with The National City Bank of New York, San Juan Branch, party of the second part, the sum of One Hundred Forty Thousand Three Hundred Dollars (\$140,300) in escrow to be held in trust by the party of the second part until final judgment is entered in the above mentioned case.

2. The National City Bank of New York, San Juan, Branch, party of the second part, hereby acknowledges receipt from the party of the first part, of the said sum of One Hundred Forty Thousand Three Hundred Dollars (\$140,300) which sum is placed in escrow with the said Bank to be paid out only upon receipt and in accordance with certified copy of final judgment which will be entered in the aforementioned case No. 7466, entitled, The People of Puerto Rico vs. Russell & Co., S. EN C.

3. The party of the second part is to receive from the party of the first part, for and in consideration of its services as escrow agent in this matter, a fee which has already been fixed by mutual agreement.

In Witness Whereof, the parties hereto have caused these pres-

ents to be signed and executed by their respective officers thereunto duly authorized, the day and year hereinabove stated.

RUSSELL & CO. SUCRS.,

by H. L. Cochran, *Partner*.

THE NATIONAL CITY BANK OF NEW YORK,

San Juan Branch,

by Edson L. Booth, *Manager*,

and by D. P. Campbell,

Assistant Manager.

Affidavit No. 722.

Subscribed to before me by Mr. Herman L. Cochran, of full age, married and resident of this city, partner of Russell & Co. Sucrs., and by Mr. Edson L. Booth, and by Mr. Donald P. Campbell, both of full age, married and residents of this city, manager and assistant manager respectively of The National City Bank of New York, San Juan Branch, all of them to me personally known.

San Juan, P. R., May 13, 1940.

R. RODRIGUEZ LEBRON,

Notary Public.

[The same title.]

ORDER.

San Juan, Puerto Rico, May 15, 1940.

The foregoing stipulation *re* supersedeas and cost bonds signed by counsel for the defendant and for plaintiff having been duly examined is hereby approved.

It was so decreed as witness the signature of the Chief Justice.

EMILIO DEL TORO,

Chief Justice.

Attest: JOAQUIN LOPEZ, *Secretary-Reporter*.

[The same title.]

**MOTION REQUESTING TRANSMISSION OF ORIGINAL
EXHIBITS TO THE CIRCUIT COURT OF BOSTON.**

[Filed in the Supreme Court July 2, 1940.]

Now comes the defendant herein and alleges:

1. That on April 22 of this year it appealed from the judgment rendered against the defendant by this court on March 14, 1940, to the United States Circuit Court of Appeals for the First Circuit.

2. That for purposes of perfecting the transcript of record it is necessary that this court enter a resolution ordering that the following original exhibits be forwarded to the Circuit Court, as they cannot be copied:

Plaintiff's Exhibit 1 — Plan entitled "Puerto Rico Irrigation Service".

Plaintiff's Exhibit 2 — Two maps entitled "Toño Negro Hydro-Electric Project".

Plaintiff's Exhibit 3 — Four maps entitled "Utilizacion de las Fuentes Fluviales."

Exhibit B-1 — Five blueprints.

For the above stated reasons it is hereby requested that this court enter an order commanding the clerk of this court to send to the United States Circuit Court of Appeals for the First Circuit the above original exhibits.

San Juan, Puerto Rico, July 2, 1940.

R. CASTRO FERNANDEZ,

Attorney for the Defendant-Appellant.

Copy served this second day of July, 1940.

GEORGE A. MALCOLM, Attorney General,

by C. H. JULIA,

Attorneys for the Plaintiff.

[The same title.]

ORDER.

San Juan, Puerto Rico, July 3, 1940.

The foregoing motion regarding original exhibits to be sent to the United States Circuit Court of Appeals is hereby sustained.

It was so ordered by the court as witness the signature of the Chief Justice.

EMILIO DEL TORO,

Chief Justice.

Attest: JOAQUIN LOPEZ, *Secretary-Reporter.*

[Title omitted.]

TRANSLATOR'S CERTIFICATE.

I, B. Marrero Rios, official interpreter and translator of the Supreme Court of Puerto Rico, do hereby certify:

That the foregoing is a true and faithful translation of their respective originals as the same appear from the original record of this case on file in this office.

In testimony whereof, I have signed this certificate in the City of San Juan, Puerto Rico, this thirty-first day of July, 1940.

B. MARRERO RIOS,

*Official Interpreter and Translator
of the Supreme Court of Puerto Rico.*

[Title omitted.]

CLERK'S CERTIFICATE.

I, Joaquin Lopez, Secretary-Reporter of the Supreme Court of Puerto Rico, do hereby certify:

That the foregoing papers and proceedings had in the above-entitled case are true and faithful copies of their respective originals as the same appear on file and of record in this office and embodied in this transcript by the appellant, according to the order of the court.

That the attached plan, maps and blueprints are Plaintiff's Exhibits 1, 2 and 3, and Exhibit B-1, transmitted to the Supreme Court of Puerto Rico with the record of this case on appeal, by the clerk of the District Court of San Juan.

I further certify that the translation of said papers and proceedings has been revised by the official translator of this court; as shown by his certificate attached and made a part of this transcript.

In testimony whereof, I have hereunto set my hand and affixed the seal of this court, in the City of San Juan, Puerto Rico, this first day of August, 1940.

JOAQUIN LOPEZ,

Secretary-Reporter, Supreme Court of Puerto Rico.

[\$92.50 internal revenue stamps cancelled.]

[MEMORANDUM. Orders of enlargement of time for docketing case to, and including, September 5, 1940, are here omitted.
A. I. CHARRON, Clerk.]

[fol. 180] Proceedings in Circuit Court of Appeals

On January 7, 1941, this cause came on to be heard, and was fully heard by the court, Honorable Calvert Magruder, and Honorable John C. Mahoney, Circuit Judges, and Honorable John P. Hartigan, District Judge, sitting.

Thereafter, to wit, on March 10, 1941, the following opinion of the Court was filed:

[fol. 181] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FIRST CIRCUIT

October Term, 1940

No. 3617

RUSSELL & Co., S. EN C., Defendant, Appellant,

vs.

THE PEOPLE OF PUERTO RICO, Plaintiff, Appellee

Appeal from the Supreme Court of Puerto Rico
Before Magruder, Mahoney and Hartigan, JJ.

OPINION OF THE COURT—March 10, 1941

MAHONEY, J.:

This is an appeal from a judgment of the Supreme Court of Puerto Rico reversing a judgment of the District Court of San Juan and ordering the defendant, Russell & Co., a sociedad en commandita organized under the laws of Puerto Rico, to pay to the plaintiff, The People of Puerto Rico, the sum of \$61,617.04 with interest from and after June 24, 1930, on which date the original complaint was filed, plus the sum of \$36,051.84, with interest from June 28, 1934, the date on which the amended complaint was filed, without costs and attorneys' fees. The case was tried on a stipulation of facts, some oral testimony and exhibits.

Russell & Co. is the owner and lessee of certain estates which lie along or abut upon the Jacaguas River, and is the owner by virtue of certain concessions and royal decrees [fol. 182] of the Spanish Crown or by uses and prescriptions of the right to take water from the Jacaguas River for irrigating these estates in an amount equivalent to an

aggregate of 12,612.1 acre feet per year. The said water was taken from the river bed through intakes constructed for that purpose by the predecessors in title of the defendant. The term defendant hereinafter used in this opinion shall include the defendant's predecessors in title. These concessions and water rights were in full force and effect from the earliest time down to their suspension by contract in 1914.

By a law approved September 18, 1908, called the Public Irrigation Law (Laws of Puerto Rico, 1909, p. 152) provision was made for the construction of a public irrigation system on the south coast of Puerto Rico. As part of the construction of this system, the plaintiff erected a dam, known as the Guayabal Dam, for the impounding and storing of a part of the water of the Jacaguas River. This dam extended across the bed of the Jacaguas River above the intakes which the defendant used for taking water for the irrigation of its lands.

It is clear that the construction of the irrigation system would impair or interfere with the rights of the owners of water concessions on the Jacaguas River unless special provisions were made to acquire these rights or provide for their equivalent. Therefore, the irrigation law provided that the plaintiff might acquire existing water rights on the Jacaguas River by condemnation, in which case the fair value thereof would be paid in cash to the owners. Provision also was made for the relinquishment of concessions by contracts between the plaintiff and the owners of water rights appurtenant to land within the irrigation district, in which case the value of the rights would not be paid in cash to the owners but would be credited upon their proportionate part of future assessments for the construction and operation of the dam. The defendant's water rights were not condemned; nor did it relinquish them by contract, as provided in the irrigation law, since its lands were not within the irrigation district.

In 1913 the Public Irrigation Law was amended (Laws of [fol. 183] Puerto Rico, 1913, p. 54). Section 13 of the amendment provided that "in the case of any land carrying a water right or concession of which the source of supply is destroyed or impaired by the construction or operation of the irrigation system, which shall not have been relinquished or surrendered to The People of Puerto Rico, such land shall be entitled to receive from the irrigation system

an amount of water which is the reasonable equivalent in value of the said water right or concession." The Commissioner of the Interior was authorized to enter into agreements with the owners of water concessions whose lands had not been included in the irrigation district for the purpose of fixing the amount of water, and the time, place and conditions of delivery thereof, which the owners were to receive as such equivalent of their water rights in consideration of the suspension of such rights.

Pursuant to this section the Commissioner of the Interior entered into contracts with the defendant which provided for the suspension of the water rights of the defendant for the period of the contract and guaranteed the delivery of a specified equivalent amount of water to be delivered by the plaintiff at the intakes of the defendant. The contract stated the claims of the defendant to the water concessions and recited the construction of the irrigation system which might interrupt and impair these rights. It asserted that the water rights had not been relinquished or surrendered and that the defendant was unwilling to enter into an agreement for such surrender. The contract further stated that the amount of water taken by the defendant under its water rights varied from month to month in accordance with the rainfall so that it was impossible to determine in advance the amount of water to which the defendant was entitled for any fixed period of time. It declared the readiness of the plaintiff to deliver from the Jacaguas River the amount of water to which the defendant was entitled under its concession; but, in order to make more certain the operation of the irrigation system, it was declared to be the desire of the plaintiff to agree upon a regular amount of water which, under all the circumstances, would be considered the [fol. 184] fair equivalent in value for irrigation purposes of the amount of water which the defendant would ordinarily take and use under its water rights. The parties then agreed as to the amounts of water which should be considered the fair equivalent in value of the water which the defendant had been taking under its concessions, and the plaintiff agreed to deliver such water at the various intakes provided by the defendant for the reception of the same. The contract also made provisions for the taking of torrential water by the defendant, but this does not become material in this suit. It was provided that in the case of underground filtration or seepage from behind the dam, the defendant

might make use of the water in the river because of such seepage without payment or responsibility to the plaintiff. Provision also was made that if the defendant desired delivery of the water to be made at places other than those agreed upon the plaintiff would make such delivery, but "all extra expense occasioned by such delivery shall be borne by the [defendant], its successors or assigns." The fifth clause of the contract provided that the defendant should exercise its old concessions during ten days in each year in order to prevent their being destroyed by non-use.

The Public Irrigation Law also provided that all lands in the irrigation district should be annually assessed a uniform amount per acre, in order to defray the costs of construction, maintenance and operation of the system. Those persons whose water rights had been condemned and paid for in cash were taxed in the same manner as those land owners whose land was included in the irrigation district but who had never had any water rights or concessions. As provided by law, those owners of water rights appurtenant to lands within the irrigation district who had relinquished such rights by contract with the plaintiff had a certain part of the value of those rights credited each year against the tax assessed against them. No provision was made for taxing those owners of water rights whose lands were not included in the irrigation district and who had not relinquished their rights to the plaintiff, but who had contracts with the plaintiff providing for the delivery [fol 185] of an equivalent amount of water in consideration of the suspension of their water rights.

In 1921 the Legislature passed Act 49 (Laws of Puerto Rico, 1921, p. 366) entitled "An Act Fixing a Tax on Certain Lands using Water from the Southern Coast Public Irrigation System, on which lands no Tax Whatsoever was Levied Under the Public Irrigation Law, and for Other Purposes." The first section levied a special tax on all parcels of land which are supplied with water for irrigation purposes from the irrigation system constructed pursuant to the Public Irrigation Law but which under the present law in no way contribute to the payment of expenses for the maintenance of the system. The second section set out the manner in which the taxes should be computed. The Treasurer was directed to find the total number of acres receiving water from the irrigation system including, in sub-section 4, land irrigated by water supplied by the plaintiff as the

equivalent of the water formerly taken under the water rights suspended pursuant to the contracts between the plaintiff and the owners of such rights.¹ The Treasurer of [fol. 186] Puerto Rico was then to take the amount estimated by the Commissioner of the Interior as necessary to defray the cost of operation and maintenance of the irrigation system for the following year and was to add thereto or subtract therefrom any deficit or surplus which was certified by the Commissioner of the Interior as remaining after the payment of expenses for operating and maintaining the system during the preceding year. The amount so determined was to be divided by the total number of acres and the result was to constitute the tax per acre which was to normal rate for delivery per acre for the formation of the irrigation district; (4) parcels of land irrigated by water supplied because of acquired rights or concessions which be levied during the next year on all lands supplied with water from the irrigation system which "in no other manner are subject to the payment of a tax to meet the cost of the irrigation system".

¹"Section 2. . . . The Treasurer of Porto Rico shall have charge of fixing the total number of acres receiving water from the irrigation system which includes: (1) tracts of lands subject to taxation pursuant to the provisions of the public irrigation law and amendments thereto, for the purpose of reimbursing the cost of the irrigation works; (2) tracts of land to which the Irrigation Commission acknowledged the right to the use of water or to which such right was acknowledged by the courts in cases of appeal, as rights acquired under the law for the use of water under prior concessions; (3) tracts of land irrigated with water delivered in accordance with acquired rights or concessions which have not been assigned, which said water, pursuant to the terms of the contracts entered into with the Commissioner of the Interior or because of decisions of the Irrigation Commission, is delivered in whole or in part and is measured at the canals of the Irrigation Service system, and such tracts shall be determined by dividing the value of the said concessions in acre-feet per year, as the same may be or shall have been fixed by the Commissioner of the Interior by the Irrigation Commission or by decision of the courts, by four,—that is to say, by the number of acre-feet per year established by the Public Irrigation Law as a have not been assigned, which said water, pursuant to the

In 1924 the defendant brought suit in the District Court of the United States for Puerto Rico to enjoin the territorial government from attempting to collect any tax under Act 49. The government was so enjoined, but while an appeal was pending Congress passed a statute forbidding the maintenance of a suit to restrain the assessment or collection of any tax imposed by the laws of Puerto Rico. This court then remanded the case to the District Court with directions to dismiss the suit for want of jurisdiction. *Gallardo v. Havemeyer*, 21 F. (2d) 1012 (C. C. A. 1st, 1927).

On April 23, 1928, Congress passed an Act for the relief of taxpayers whose pending suits had been dismissed because of the Act above mentioned. This statute provided that in cases pending on March 4, 1927, where the taxpayer had obtained an injunction restraining the assessment or collection of a tax, the enforcement of any such tax by the [fol. 187] authorities at Puerto Rico should be by a suit at law rather than any form of summary proceeding. As a result of the passage of this Act, the plaintiff instituted this action to collect taxes under Act 49.

The suit was originally brought in the insular District Court of San Juan. It was removed to the United States District Court for Puerto Rico on the ground of diversity of citizenship. The court denied a motion to remand and entered a decree for the defendant on the grounds that the assessments sued for were levied in violation of Section 2 of the Organic Act of Puerto Rico (39 Stat. 951, 48 U. S. C. A. § 737) forbidding the enactment of any law impairing the obligation of contract, and that Act 49 was void as an

terms of the contracts entered into with the Commissioner of the Interior or under decisions of the Irrigation Commission, is taken and measured in the rivers at the points of intake indicated in the said concessions; and such tracts shall be determined by dividing the value of the said concessions in acre-feet per year, as the same may be or as shall have been fixed by the Commissioner of the Interior, by the Irrigation Commission or by decision of the courts in cases of appeal, by five."

Whether this complicated and confusing method of computation even approximately arrived at the fair apportionment of the actual operation costs of the system to be borne by those persons heretofore untaxed is a question that it is unnecessary to decide in this action.

undue delegation to administrative officers of the legislative function of levying taxes.

On appeal this court affirmed the decision of the District Court in *People of Porto Rico v. Havemeyer*, 60 F. (2d) 10 (C. C. A. 1st, 1932). The Supreme Court granted certiorari, reversed the judgment of this court on the ground that the federal court had acted without jurisdiction as the defendant was a juridical entity under Puerto Rican law, domiciled in Puerto Rico, and its domicile rather than that of its members determines citizenship for purposes of federal jurisdiction. It remanded the cause to the insular District Court from which it had been removed. The case having been remanded, the plaintiff thereupon filed an amended complaint on June 8, 1934, to claim additional taxes accrued since the filing of the suit. At the conclusion of the evidence the insular District Court followed the opinion in *People of Porto Rico v. Havemeyer*, supra, and dismissed the complaint, though it recognized that the decision could have no substantive effect, having been reversed on jurisdictional grounds.

The Supreme Court of Puerto Rico reversed the decision of the insular District Court and rendered judgment ordering the defendant to pay the tax sued for with interest. The Supreme Court felt that the reasoning of this court in *People of Porto Rico v. Havemeyer*, supra, was not binding upon it and reached an opposite result. It is from that [fol. 188] judgment that the defendant has appealed, thus bringing the case before this court for the second time.

We have been unable to find any similar case where a United States Circuit Court of Appeals passed on the merits of a case appealed from a federal district court, was reversed by the Supreme Court of the United States on jurisdictional grounds and the case remanded to the courts of another government, and later was called upon to decide the same question again between the same parties on substantially the same record on appeal from an entirely different judicial system. This peculiar situation arises because this court is made the court of appeal in certain circumstances for both the United States District Court for Puerto Rico and the territorial Supreme Court of Puerto Rico (38 Stat. 803, 28 U. S. C. A. § 225). We have undoubted jurisdiction of this appeal since the defendant contends that the taxing law in question, Act 49, violates a statute of the United States, i. e., the Organic Act of Puerto Rico.

The defendant, Russell & Co., argues that the opinion of this court on the former appeal, though reversed for lack of jurisdiction, is controlling on this court as to all matters therein decided on which the Supreme Court of the United States did not express an opinion. The argument is that the doctrines of *res judicata*, *stare decisis*, or the "law of the case" must bar any independent examination of the question presented. We can not agree. In our recent decision of *White v. Higgins*, 116 F. (2d) 312 (C. C. A. 1st, 1940), we expressed our agreement with the general doctrine that on a second appeal in the same case all questions adjudicated on the prior appeal are the law of the case and will not be reconsidered or readjudicated. *Thompson v. Maxwell Land Grant Co.*, 168 U. S. 451, 456 (1897); *Great Western Telegraph Co. v. Burnham*, 162 U. S. 339, 343-344 (1896). We have in no sense changed our position. But the present case is not one in which any of the questions were finally adjudicated. The Supreme Court of the United States decided that this court had no jurisdiction to pass upon the [fol. 189] questions raised and nullified our earlier decision. In such a situation purported decisions made without power or authority to make them cannot be considered as the law of the same case on a subsequent appeal through the proper jurisdictional channels. See *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 622-623, 93 S. E. 684, 688 (1917); *Elsom v. Tefft*, 148 Wash. 195, 196, 268 Pac. 177 (1928); cf. *In re Baird's Estate*, 193 Cal. 225, 236, 223 Pac. 974, 978 (1924).

Clearly, the Supreme Court of Puerto Rico was not bound by our former decision rendered without jurisdiction any more than would be a state Supreme Court. If it were so concluded from an independent adjudication of the merits of the controversy and if we should likewise be prevented from re-examining the questions presented, the reversal, remand and retrial of the suit would have been useless indeed, particularly since in the normal course of events the case was almost certain to be appealed again to this court. It is our opinion that if the court on the first appeal did not have jurisdiction to adjudicate the question, its judgment is not the law of the case on a subsequent appeal. Nor can the first appeal be *res judicata* or *stare decisis*, since nothing was finally adjudicated. The most that can be said for it is that it may or may not be considered persuasive reasoning for independently reaching the same result. The citation of the opinion, following its reversal, in *Rich Hill*

Coal Co. et al. v. Bashore, 334 Pa. 449, 498, 7 A. (2d) 302, 325 (1939), is simply indicative of such persuasion. The insular District Court, the Supreme Court of Puerto Rico were, and this court also is, perfectly free to pass upon the questions here presented regardless of our former decision in *People of Porto Rico v. Havemeyer*, supra.

The Supreme Court of Puerto Rico held that Act 49 did not impair the obligation of contracts on the ground that this Act merely imposed a valid tax on the owners of water rights. We do not agree. It seems clear to us that the Act impairs the obligation of contract by charging the defendant a part of the cost of maintaining and operating the irrigation system of which it was not a part and for the delivery of water to which it was entitled by contract in lieu of water which it had heretofore taken without charge.

The validity of these contracts between the plaintiff and the defendant has long since been upheld in this court. See *Veitia v. Fortuna Estates*, 240 Fed. 256 (C. C. A. 1st, 1917); *People of Porto Rico v. Russell & Co.*, 268 Fed. 723 (C. C. A. 1st, 1920). By these cases, the plaintiff was restrained from diverting from the defendant the surplus waters which it had agreed by the contracts could be taken by the defendant until the plaintiff should undertake the utilization of such surplus waters. It was immediately following the last case enjoining the plaintiff from this diversion that Act 49 was passed attempting to exact money for the support of the system from those owners of water rights who had not surrendered them but had contractual rights to the delivery of equivalent amounts of water by the irrigation system.

Prior to these contracts, the defendant had the right to take certain amounts of water from the Jacaguás River at its intakes without charge. It constructed and maintained its own intakes. This right to take water was a property right of the defendant. The plaintiff could not impair or obstruct this right without paying just compensation. The Public Irrigation Law recognized this by providing for such condemnation and compensation or for the crediting of the value of surrendered water rights against the assessments for construction and operation of the irrigation system levied on those owners of water rights who had surrendered them and were included in the irrigation district. The defendant had not surrendered its water rights and was not included in the irrigation district.

Since the defendant did not wish to relinquish its water rights, and apparently the plaintiff did not wish to condemn and pay for them, they entered into a contract to provide the defendant with the equivalent of its water rights. A lesser amount than what the defendant could take under its water rights was provided for because of the certainty of its delivery. The plaintiff insists that the defendant must [fol. 191] pay for the benefits received by it because of the irrigation system. However, by contract the defendant got no more than the equivalent of its former rights. Ostensibly it got no benefit and suffered no harm; what it gained in certainty it lost in quantity.

Under its water rights, the defendant got its water free at its intakes. Under the contract, the plaintiff agreed to deliver an amount of water equivalent in value at the defendant's intakes in consideration of the right acquired by it to carry out the irrigation scheme and interfere with the defendant's rights. There is nothing in the contract providing that the defendant pay either for the equivalent in value of water which it had heretofore received free or for delivery of such water. The opposite is implicit in the entire contract. The defendant continued to maintain its own intakes and reservoirs. Only when the defendant requests delivery at other than the contract intakes is there any provision for payment of any costs, and then the defendant is only to pay the "extra" cost of such delivery. It is also significant that the contract expressly provided that the defendant was to have free use of any waters which seeped through from the dam over and above the specific amount contracted for.

The plaintiff frankly admits that the tax in question is "very clearly simply a special tax to cover only appellant's fair share of the actual current maintenance costs of the irrigation works". That is the entire difficulty. The appellant has no "fair share" of the maintenance cost of the irrigation works to bear. It was entitled to free water before the passage of the Acts in question. The so-called tax clearly imposes a burden upon the defendant's present right to receive the water agreed to be delivered to it by the plaintiff as a substitute for its old free water rights. We agree with the former opinion of this court in *People of Porto Rico v. Havemeyer*, supra, that this Act undertakes to make the contractual right to receive the water agreed upon conditional on the payment of the taxes in question, and impairs

[fol. 192] the contractual obligation to furnish the water with no conditions in consideration of the right to build the irrigation system.

The plaintiff had an opportunity to condemn the rights and pay their full value. If after such condemnation, the land was furnished water from the system the defendant would be in the position of one who had never possessed water rights and would be subject to assessments for construction, maintenance and operation. So also if the defendant had relinquished its rights in consideration of inclusion in the district and a credit of the value of the surrendered rights against such assessments. The plaintiff made no such arrangements for payment of value. In effect, it suspended the defendant's rights without compensation and now desires to force it to pay the cost of providing it with water as though it held no rights, in spite of the contractual obligation to provide their equivalent. In such a situation the words of the Supreme Court of the United States in *Woodruff v. Trapnall*, 10 How. 190, 207 (U. S. 1850) seem particularly applicable:

"A State can no more impair, by legislation, the obligation of its own contracts, than it can impair the obligation of the contracts of individuals. We naturally look to the action of a sovereign State, to be characterized by a more scrupulous regard to justice, and a higher morality, than belong to the ordinary transactions of individuals."

See also *Antoni v. Greenhow*, 107 U. S. 769, 795 (1882); *Hall v. Wisconsin*, 103 U. S. 5 (1880); *Green v. Biddell*, 8 Wheat. 1, 92 U. S. (1832).

The plaintiff insists, however, that the tax is valid since there is no showing that the water rights or the contractual equivalent thereof were to be permanently tax free. We need not here decide whether a general property tax or other tax might validly be imposed on the defendant's right to take water from the Jacaguas River for irrigation purposes. Suffice it to say that this is not such a tax. This is a special assessment to cover the actual current maintenance costs of the irrigation works. It is based upon a benefit which is not conferred and is in violation of a contract [fo. 193] to provide an equivalent of free water. It is well settled that under the guise of levying taxes, a state may not impair the obligation of contracts. *Murray v. Charleston*, 96 U. S. 432 (1877).

The case of Metropolitan Street Ry. v. New York, 199 U. S. 1 (1905), dwelt on at length by the plaintiff is not in point. In that case the question was whether, on top of a special annual assessment provided for by contract, the State could impose a general franchise tax. In the instant case, the problem is whether the government can impose a special assessment not provided for by contract, even assuming that a general tax could be imposed. The questions are quite different.

It is our opinion that Act 49 impairs the obligation of these contracts entered into for the suspension of water rights in return for the agreement to deliver an equivalent amount of water to the defendant. In view of this determination we find it unnecessary to pass upon the question of whether there was an undue delegation of legislative power to the Commissioner of the Interior in the computation of the tax.

The judgment of the Supreme Court of Puerto Rico is reversed, and the case is remanded to that court with direction to order the complaint dismissed; the appellant recovers costs of appeal.

On the same date, to wit, March 10, 1941, the following Judgment was entered:

JUDGMENT—March 10, 1941

This cause came on to be heard January 7, 1941, upon the transcript of record of the Supreme Court of Puerto Rico and was argued by counsel.

Upon consideration whereof, It is now, to wit, March 10, 1941, here ordered, adjudged and decreed as follows: The judgment of the Supreme Court of Puerto Rico is reversed, [fol. 194] and the case is remanded to that court with direction to order the complaint dismissed; the appellant recovers costs of appeal.

By the Court.

Arthur I. Charron, Clerk.

Thereafter, to wit, on April 9, 1941, mandate was stayed until further order of court.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 192] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8426)

MAY 20

CHARLES E. HUNT

IN THE
Supreme Court of the United States

OCTOBER TERM, 1940

No. 1072 95

THE PEOPLE OF PUERTO RICO,

Petitioner,

VS.

RUSSELL & Co., S. en C.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT
OF APPEALS, FIRST CIRCUIT, AND SUPPORTING BRIEF

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Of Counsel.*

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1940

No. 1072

THE PEOPLE OF PUERTO RICO,

Petitioner,

vs.

RUSSELL & Co., S. en C.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT
OF APPEALS, FIRST CIRCUIT, AND SUPPORTING BRIEF

*To the Honorable, the Chief Justice, and the Associate
Justices of the Supreme Court of the United States:*

Petitioner, The People of Puerto Rico, prays a writ of certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit entered in this cause on March 10, 1941, reversing the judgment of the Supreme Court of Puerto Rico and remanding the case to that court with directions to order the dismissal of the complaint in this action brought by The People of Puerto Rico to recover something over \$100,000 of back taxes assessed under Act No. 49 of the Legislature of Puerto Rico of July 8, 1921.

The opinion of the Circuit Court of Appeals appears in 118 F. (2d) 225. That of the insular Supreme Court is in 56 P. R. Dec. 343 (*Spanish edition; not yet appearing in the English edition*). The former decision of the Circuit

Court of Appeals in this case (60 F. (2d) 10; June 27, 1932) was reversed by this court on jurisdictional grounds (*People of Puerto Rico vs. Russell & Co.*, 288 U. S. 476).

QUESTION PRESENTED

Does Act No. 49 of 1921 of the Legislature of Puerto Rico impair the obligation of the water rights contracts of August 26, 1914, between the Acting Commissioner of the Interior on behalf of the People of Puerto Rico and the predecessors in title of the respondent Russell & Co.?

The Circuit Court of Appeals, overruling the insular Supreme Court, holds that the Act does impair the obligation of those contracts, and is therefore beyond the power of the Legislature and invalid. Petitioner, on the contrary, believes that it does not; that the judgment of the Supreme Court of Puerto Rico upholding the Act was right, and should be affirmed.

STATEMENT

The case is stated in the first eight pages of the opinion of the Circuit Court of Appeals (R. 180-187, and the first 6 lines of 188; 118 F. (2d), *supra*, at pp. 226-230).

STATUTES

Act No. 49 of July 8, 1921, of the Legislature of Puerto Rico (Laws of Puerto Rico, 1921, pp. 366-370),

"Fixing a tax on certain lands using water from the Southern Coast Public Irrigation System, on which lands no tax whatsoever was levied under the Public Irrigation Law, and for other purposes",

the Act here directly assailed by the respondent, is in the Appendix (*infra*, pp. 27-30), as are likewise other pertinent Constitutional and statutory provisions, federal and insular (*infra*, pp. 27, 30-43), including pertinent portions of the insular Irrigation Law of 1908, and of the amendatory Act of 1913 (*infra*, pp. 30-33, 34-43).

CONTRACTS

Copies of the contracts of August 26, 1914, here involved, are "Exhibit A" and "Exhibit B" to the respondent's answer to the amended complaint in the District Court (R. 22-53).

These contracts have been before the courts in earlier cases. *Confer, Veitia vs. Fortuna Estates*, 240 Fed. 256; *People of Puerto Rico vs. Russell & Co.*, 268 Fed. 723.¹ In the latter case the Circuit Court of Appeals analyzed the contracts at length (at pp. 726-729), as well as (at pp. 725-726) the provisions of the antecedent irrigation Acts of 1908 and 1913 (Appendix, *infra*, pp. 30-43); and held, with relation to Section 13 of the Act of August 8, 1913 (Appendix, *infra*, pp. 41-43) that (268 Fed., *supra*, at p. 726):

"The power of the government officials to contract with the owners of water rights was, under this section of the statute, limited to giving in exchange for the old water rights water which would be a fair equivalent in value."

That holding was referred to with approval by the Circuit Court of Appeals in its former opinion in the present litigation (60 F. (2d), *supra*, at p. 13). It is in harmony with the insular Supreme Court's interpretation of the contracts in the present case (R. 156).² It is believed that it may safely be regarded as the law of this case.

¹ Also in *Gallardo, Treasurer vs. Havemeyer, et al.* [Russell & Co.], 21 F. (2d) 1012; remanded to the federal District Court of Puerto Rico with directions to dismiss the case for want of jurisdiction; one of the tax injunction cases dismissed by the Circuit Court of Appeals, First Circuit, pursuant to the decision of this Court in *Smallwood vs. Gallardo, Treasurer*, 275 U. S. 56, under the Butler Act of March 2, 1917 (44 Stat. 1418, 1421), forbidding the maintenance of tax injunction suits in the federal District Court for Puerto Rico.

² "The contracts do not say that the People of Puerto Rico bind themselves not to impose taxes. Indeed, even if a clause like that had been included, we apprehend it would have been void." (R. 156). [*Italics supplied*]

OPINION OF THE SUPREME COURT OF PUERTO RICO

The Supreme Court of Puerto Rico,³ invites attention (R. 156) to the fact that the contracts of August 26, 1914 "do not say that the People of Puerto Rico bind themselves not to impose taxes"; and that,

"Indeed, even if a clause like that had been included, we apprehend it would have been void";

and also, with reference to the antecedent concessions for water rights held from the Crown of Spain by the appellant Russell & Co.'s predecessors in title, the taking of water under which had been suspended by the 1914 contracts in exchange for the water being received from the insular government irrigation system, the insular Supreme Court says (R. 156-157):

"While it is true, as the appellee says, that the appellant accepted and admitted that said concessions

³ Reversing the insular District Court of San Juan (R. 54-65) which had considered itself bound by the former opinion of the Circuit Court of Appeals in this case (60 F. (2d) 10, *supra*), although that decision had been reversed by this Court on jurisdictional grounds (288 U. S. 476, *supra*). The insular Supreme Court holds as to this matter that the former opinion of the Circuit Court of Appeals, having thus been reversed by this Court, although only on jurisdictional grounds, is not *stare decisis*, but that (R. 150):

"The reasoning of the Circuit Court should be given careful attention but under the circumstances is not binding";

with which the Circuit Court of Appeals itself agrees (*Opinion*, R. 187-188; 118 F. (2d) 225, 229-230), concluding:

"The insular District Court, the Supreme Court of Puerto Rico were, and this court also is, perfectly free to pass upon the questions here presented regardless of our former decision in *People of Porto Rico v. Havemeyer, supra*".

existed, nothing has been brought before this or any of the other courts which have passed on this case to show that a tax exemption was attached to them. As far as the record goes, these concessions are ordinary water concessions, like a number of others granted to land-owners in this Island and Spain. The only provision of which we know in regard to taxes was a section in the primitive Law of Waters by which the Crown bound itself not to raise the taxes on the lands benefited by the concession during a ten-year period."

The insular Supreme Court holds, therefore, that there is no impairment of the contracts. [The old Spanish concessions were taxable; the contracts of 1914 said nothing about waiving the Government tax rights; hence the substituted property right or franchise to receive water from the government system remains taxable, likewise as the former concessions; Act No. 49 of 1921 was simply an exercise of the governmental power to tax. Its fairness appears unquestionable].⁴

⁴ Upon the other question argued in the Circuit Court of Appeals in this case upon which that court said that it was "unnecessary to pass" (R. 191; 118 F. (2d) at p. 231), viz., whether Act No. 49 of 1921 makes any undue delegation of legislative power to the Commissioner of the Interior in the computation of the tax, the insular Supreme Court also upholds the statute. It interprets it as delegating only administrative rather than legislative powers. It holds (R. 154, 156):

"As we shall see later from the Act itself, what the Commissioner does is to fill in details. (R. 154) * * *"

"If the estimate is too high or too low, a surplus or a deficit will result. A surplus will be credited to the budget of the following year, thereby reducing the tax; a deficit will be added to the budget of the following year. Thus, any error committed by the commissioner will be automatically corrected when the next budget is prepared. It will be seen that the commissioner's discretion does not play an important part in the computation of the tax. Indeed, the commissioner's role could be eliminated and the cost of maintenance estimated

OPINION OF THE CIRCUIT COURT OF APPEALS

As stated, the Circuit Court of Appeals, in disagreement with the insular Supreme Court, considers that Act No. 49 impairs the obligation of the contracts. It reverses the insular court on that ground alone (R. 188-191; 118 F. (2d) at pp. 230-231).

PETITIONER'S POSITION

Petitioner believes:

First. The insular Supreme Court was right. Act No. 49 does not in any respect impair the obligation of the contracts.

Second. In any event, the view of the insular Supreme Court is clearly not unreasonable. That court was here interpreting local contracts and local statutes, all originally written in the Spanish language, and dealing with local conditions and business practices arising under laws originally derived from the Spanish system. The insular court's decision is certainly not so "patently erroneous" or "inescapably wrong" as to require or to justify its reversal by the Circuit Court of Appeals. *Sancho Bonet, Treasurer vs. Texas Company*, 308 U. S. 463, 471; *Sancho Bonet, Treasurer vs. Yabucoa Sugar Co.*, 306 U. S. 505, 509-511:

some other way. For example, the budget of a previous year to be taken as tentative for the following one. Such a procedure is followed in estimating the premium rates for the State Insurance Fund.

"The landowner pays the tax in the computation of which the commissioner's report is used. But since any difference between that estimate and the real cost of maintenance is adjusted the landowner is really paying for the exact cost of maintenance.

"Furthermore, it has not been charged, or even suggested that the commissioner's estimates are unjust, or confiscatory.

"We hold, therefore, that the act contains no undue delegation of powers." (R. 156)

REASONS FOR GRANTING THE WRIT

This case involves a serious disregard by the Circuit Court of Appeals of the spirit as well as the letter of the rule established and repeatedly emphasized by this Court of the respect to be accorded to decisions of a local Territorial Supreme Court, such as that of Puerto Rico, in interpreting and applying local statutes and local contracts in view of local conditions (*Sancho Bonet, Treasurer vs. Texas Company, supra*, 308 U. S. 463, 471; *Sancho Bonet, Treasurer vs. Yabucoa Sugar Co., supra*, 306 U. S. 505, 509-511); particularly in view of the fact that the Territorial Supreme Court was here construing contracts [as well as statutes] originally written in the Spanish language, dealing with the water rights and business customs derived from the Spanish civil law system, *Diaz vs. Gonzalez*, 261 U. S. 102, 105-106.

In this case the Circuit Court of Appeals has decided an important question of local law [of the meaning of these contracts] in a way directly in conflict with the local decision of the local court of last resort. The importance of the question of the validity of the insular taxing statute under attack is self-evident. If the decision of the Circuit Court of Appeals in this case is permitted to stand it means that the whole system of ascertainment, apportionment and assessment of the annual costs of the operation and maintenance of the Southern Coast Public Irrigation System, uniformly followed for many years, has been unlawful. The result would be not only the necessity of a prompt and extensive revision of the existing statutes, but, also, in all probability, the institution of numerous actions against the insular Government for refunds of taxes and assessments already collected under those statutes.

As a further reason for granting the writ your petitioner respectfully urges that certiorari might well be granted by this Court almost as a matter of course to review judgments of the Circuit Court of Appeals in cases which, like this, are closely analogous to those involving State statutes,

described in paragraph (b) of Section 240 of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 939; except that they involve the validity of Territorial statutes, instead of State statutes. In other words, since Section 240 (b) of the Judicial Code gives a definite right to a review of any judgment of a Circuit Court of Appeals holding a State statute invalid, at the instance of the party relying on such statute, it would seem fair and logical for this Court to make a practice of ordinarily likewise granting certiorari in analogous cases involving the validity of Territorial statutes,—such as, in this case, this Act of the Puerto Rican Legislature; particularly where, as here, the statute has been upheld by the Territorial court of last resort, but stricken down by the Circuit Court of Appeals. This would seem to be especially true where the insular statute in question, as in the present case, constitutes an exercise of the taxing power of the insular Legislature, and the party seeking the review is the insular Government itself.

Your petitioner therefore respectfully urges that the questions presented are such as should be finally settled and determined by this Court; and that this petition be granted.

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GEORGE A. MALCOLM,
Attorney General of Puerto Rico,

NATHAN R. MARGOLD,
*Solicitor for the Department of the Interior,
Of Counsel.*

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the insular District Court of San Juan ("Statement of the Case and Opinion", R. 54-56) is not officially reported. The opinion of the Supreme Court of Puerto Rico, March 15, 1940 (R. 148-168) is reported in 56 P. R. Dec. 343 (*Spanish edition*). It has not yet appeared in the English edition of the Puerto Rico Reports.

The opinion of the Circuit Court of Appeals (R. 180-191) appears in 118 F. (2d) 225 (*Advance Sheets*).

The former opinion of the Circuit Court of Appeals, June 27, 1932, in this case is reported as *People of Porto Rico vs. Havemeyer et al.*, 60 F. (2d) 10; and that of this Court, March 13, 1933, reversing it on jurisdictional grounds, as *Puerto Rico vs. Russell & Co.*, 288 U. S. 476.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code of the United States as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

The judgment of the Circuit Court of Appeals was entered March 10, 1941 (R. 191).

QUESTION PRESENTED

The single question here presented is stated in the Petition ("Question Presented", *ante*, p. 2).

STATUTES

These are indicated in the Petition (*ante*, p. 2), and pertinent parts are set out in the Appendix (*infra*, pp. 27-43).

STATEMENT

As indicated under the heading "Statement" in the Petition (*ante*, p. 2), the case is stated in the first eight pages of the opinion of the Circuit Court of Appeals (R. 180-187, and the first 6 lines of 188; 118 F. (2d), *supra*, at pp. 226-230).

SPECIFICATION OF ERRORS TO BE URGED

These are indicated under the headings "Question Presented", "Petitioner's Position", and "Reasons for Granting the Writ" in the Petition (*ante*, pp. 6, and 7-8).

SUMMARY OF ARGUMENT

The argument is summarized under the headings "Petitioner's Position" and "Reasons for Granting the Writ" in the Petition (*ante*, pp. 6 and 7-8).

ARGUMENT

POINT I

The Supreme Court of Puerto Rico was right in holding that Act No. 49 of 1921 does not impair the obligation of the contracts of August 26, 1914; and the Circuit Court of Appeals erred in overruling the decision of the insular Supreme Court.

A. By assessing the lands in question for a *pro rata* share of the actual costs of currently maintaining and operating the system from which they are irrigated, Act No. 49 of 1921 does not impair the obligation of the contracts of August 26, 1914; because the contracts contain no provision exempting those lands from taxation; because such exemption cannot be presumed; because the official executing the contracts on behalf of the Puerto Rican Government had no authority to put any such provision into them [and did not do so]; and because, in the absence of any such exemption provision in the contracts, the Act of 1921 is clearly within the legislative powers of the insular Legislature.

B. The People of Puerto Rico has no quarrel with the general principles stated by the Circuit Court of Appeals in its opinion, namely, that a State cannot impair the obligations of its own contracts, and that this rule constitutes a limitation upon the power of taxation as well as upon other powers. The insular Government fully recognizes the soundness and force of those principles wherever they are applicable, and is more than willing that its actions under review in this case, as well as in all other connections, shall be judged according to the standard suggested in the

opinion of this Court, there cited, in *Woodruff vs. Trapnall*, 10 How. 190, 207; that is, "to be characterized by a more scrupulous regard for justice and a higher morality than belong to the ordinary transactions of individuals."

The People of Puerto Rico cannot justly be charged with any selfish interest whatever in the result of this controversy. The special taxes or assessments here in question, if and when collected, will simply accrue to the special fund for the current operation and maintenance of the irrigation district, and thus serve only to lower the assessments upon other lands now taxed for such operation and maintenance. The insular Treasury can derive no direct benefit. It is mainly on behalf of the farmers of the Southern Coast Public Irrigation District, and in the hope of securing justice for them, that The People of Puerto Rico has sought by the Act in question, and is seeking by this action, to compel the appellant *societal* to pay simply its fair and reasonable share of the current cost of operating and maintaining the system.

The position of the insular Government with relation to the present point is that the tax imposed by Act No. 49 does not impair the obligations of the contracts of August 26, 1914, *because the Government in those contracts did not agree not to tax the water rights therein granted to the predecessors in interest of the present appellant*. Neither of the contracts contains any limitation whatever upon the insular government's power of taxation; nor does the Act of August 8, 1913, under which they were made. Even if the contracts had contained such an undertaking it would have been illegal and void, as the insular Supreme Court correctly notes [R. 156, *supra*], because wholly unauthorized by the enabling statute. As the Circuit Court of Appeals said, more than twenty years ago, the second time it had these contracts before it, in *People of Porto Rico vs. Russell & Co.*, *supra*, 268 Fed. 723, 726, October 28, 1920 [*quoted; ante*, p. 3], and approved twelve years later in its former opinion in the present case [60 F. (2d) *supra*, at p. 13], the power of

the government officials executing them was "limited to giving in exchange for the old water rights water which would be a fair equivalent in value".

C. Nor can such a tax waiver by the Government be inferred or implied, because of the well settled principle that *the taxing power of a government is never presumed to be relinquished*, and continues to exist with relation to property or rights granted by the Government, unless a contrary intention is declared in clear and unambiguous terms. This we regard as clearly established by the authorities relied upon by the Supreme Court of Puerto Rico in its opinion on this branch of the case (R. 156-167), which is believed to be entirely sound. Reference may also be made to the recent decision of the Circuit Court of Appeals for the First Circuit, itself, in *Porto Rico Ry. Lt. and Power Co. vs. Colom, Commissioner*, 106 F. (2d) 345, 351-352, that, *as against the government, a contract or franchise is not to be extended beyond its express terms; and to Society for Savings vs. Coite*, 6 Wall. 594, 606; and also to *Metro-politan Street Ry. Co. vs. New York*, 199 U. S. 1, 35-46 (*infra*, pp. 15-18).

D. It will hardly be contended that the original concessions granted by the Spanish Government to the predecessors in interest of the appellant *sociedad* were not subject to taxation by the insular Government. The contracts of August 26, 1914, constituted merely an agreement on the part of the Government that the holders of those concessions should receive from this irrigation system certain amounts of water agreed to be equivalent in value to those which they had been entitled to take under their concessions. *What was there in those contracts or in the circumstances under which they were made to justify the inference that the rights granted by the contracts were to be forever tax free? Why should the Government have given tax-exempt water rights in exchange for taxable water rights? Where was the consideration moving to the Government, or to the land owners of the irrigation district, sufficient to justify the perpetual*

release of the concession holders from any assessment whatever toward the cost of maintaining the service from which they were to be supplied? There was none. The concession holders simply exchanged taxable rights under their original concessions for rights equally taxable under the contracts.

E. Apparently the Circuit Court of Appeals, in that portion of its former opinion concerning this phase of the controversy, was influenced to some degree by an assumption that The People of Puerto Rico would have been unable to go ahead with the operation of the South Coast Irrigation District at all, if they had not been able to agree with the concession holders on a surrender of the concessions in exchange for equivalent water from the system [*Confer* 60 F. (2d), *supra*, at p. 14, "*which otherwise it could not do*"]. But this is not a fair assumption from the record. There is nothing to indicate that, had the Government so elected, it could not have modified the Jacaguas part of the plan so as to permit enough water to continue in the course of the river to provide these concession holders with the full amounts allowed by their concessions, while using the remainder, supplemented by the waters drawn through the tunnel from the Toro Negro River [from the well-watered north slope of the mountain chain], and perhaps other waters from other sources, for the desired development in that valley. The recitals in the contracts appear to indicate that the Government was prepared to do so: "*is ready to deliver . . . the amount of water . . . but in order to facilitate . . .*" (R. 26, 43-44.)

F. In support of its holding that Act No. 49 impairs the obligations of the contracts of August 26, 1914, the Circuit Court cites (R. 190; 118 F. (2d) at 231), and in its former opinion quoted (60 F. (2d), *supra*, at p. 15) from, *Murray vs. Charleston*, 96 U. S. 432, to the effect that a State or municipality may not, under the guise of levying taxes, impair the obligation of a contract. In that case the City of Charleston, Virginia, in order to raise money for municipal purposes, had issued and sold obligations bearing interest at

6 per centum per annum. Subsequently the city had levied a tax of 2 per centum on all real and personal property in the city, and the city authorities had attempted to collect this tax on certain of the city obligations owned by a resident of Germany by deducting the amount of the tax from payments of interest due from the city to the holder of the obligations. *It was not the tax on the obligations which was held to be an impairment of the contract in that case, but it was the attempt by the city to collect that tax by means of a deduction thereof from interest payments, that was held to constitute the impairment.* This Court there said, among other things (96 U. S. 432; *supra*; at p. 445) :

“Is, then, property, which consists in the promise of a State, or of a municipality of a State, beyond the reach of taxation? We do not affirm that it is. A State may undoubtedly tax any of its creditors within its jurisdiction for the debt due to him, and regulate the amount of the tax by the rate of interest the debt bears, if its promise be left unchanged. A tax thus laid impairs no obligation assumed. It leaves the contract untouched. But until payment of the debt or interest has been made, as stipulated, we think no act of State sovereignty can work an exoneration from what has been promised to the creditor; namely, payment to him, without a violation of the Constitution. The true rule of every case of property founded on contract with the government is this: It must first be reduced into possession, and then it will become subject, in common with other similar property, to the right of the government to raise contributions upon it.”

In short, in that *City of Charleston* case, if the city had fully complied with its contract by paying the full amount of the required interest, and had the owner of the municipal obligations in question been a resident of the city, then the city might lawfully have proceeded against such owner, together with the other owners of real and personal property within the city, for the collection of the tax, and there would have been no impairment of the obligation of the contract in a constitutional sense. *In the present case the insular Gov-*

ernment is withholding nothing from the appellant sociedad to which it is entitled under the contracts in question. The appellant and its predecessors in interest have been receiving all of the water called for by the contracts; and the insular Government is neither withholding nor proposing to withhold a single drop of it. The contracts here continue to be scrupulously fulfilled, and the Act of 1921 does not militate against such fulfillment. It must be obvious therefore that the case of *Murray vs. Charleston* affords no basis whatever for a holding in this case that the Act here in question impairs the obligations of the 1914 contracts in a constitutional sense.

G. An interesting and authoritative discussion of some of the principles involved in this connection will be found in the case of *Metropolitan Street Ry. Co. vs. New York*, 199 U. S. 1, *supra*. The street railway company under its charter was required to pay certain percentages of its gross receipts into the municipal treasury each year. Subsequently the Legislature of New York amended the state tax laws so as to make subject to general taxation all railway franchises, providing that where the companies were already paying a percentage of gross receipts, such payments should be deducted from their assessments. The railway company contested the validity of this statute upon the ground, among others, that it impaired the obligation of the contract embodied in its charter, by requiring the company to make payments in excess of those required by the charter. This Court affirmed the judgment of the Supreme Court of New York entered pursuant to the decision of the New York Court of Appeals (199 U. S., *supra*, at p. 5; and *cf.* 174 N. Y. 417) sustaining the validity of the statute upon the ground that the charter contained no clear and unequivocal exemption of the franchise from taxation, that the surrender of the taxing power is never to be presumed, and that therefore the increased tax involved no impairment of the charter contract. We quote from the opinion of the Court in that case as follows (199 U. S. *supra*, at pp. 35-38):

"The main contention is that this tax legislation impairs the obligation of contracts. It must be borne in mind that presumptively all property within the territorial limits of a State is subject to its taxing power. Whoever insists that any particular property is not so subject has the burden of proof and must make it entirely clear that, by contract or otherwise, the property is beyond its reach. In *Providence Bank vs. Billings*, 4 Pet. 514, MR. CHIEF JUSTICE MARSHALL, in delivering the opinion of the court, said (p. 561):

"That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear."

"In *Vicksburg &c. R. R. Co. vs. Dennis*, 116 U. S. 665, MR. JUSTICE GRAY cited many authorities, quoting the different phraseology in which by the several writers of the opinions the same rule was announced. In *Wells vs. Savannah*, 181 U. S. 531, the law was thus stated by MR. JUSTICE PECKHAM (p. 539):

"The payment of taxes on account of property otherwise liable to taxation can only be avoided by clear proof of a valid contract of exemption from such payment and the validity of such contract presupposes a good consideration therefor. If the property be in its nature taxable the contract exempting it from taxation must, as we have said, be clearly proved. It will not be inferred from facts which do not lead irresistibly and necessarily to the existence of the contract. The facts proved must show either a contract expressed in terms, or else it must be implied from facts which leave no room for doubt that such was the intention of the parties and that a valid consideration existed for the contract. If there be any doubt on these matters, the

contract has not been proven and the exemption does not exist.'

"In *Chicago Theological Seminary vs. Illinois*, 188 U. S. 662, the same Justice declared (p. 672):

"The rule is that, in claims for exemption from taxation under legislative authority, the exemption must be plainly and unmistakably granted; it cannot exist by implication only; a doubt is fatal to the claim."

"See also *Erie Ry. Co. vs. Pennsylvania*, 21 Wall. 492; *Wilmington & Weldon R.R. Co. vs. Alsbrook*, 146 U. S. 279; *Ford vs. Delta & Pine Land Co.*, 164 U. S. 662.

"This rule is akin to, if not part of, the broad proposition, now universally accepted, that in grants from the public nothing passes by implication. As said by MR. CHIEF JUSTICE TANEY, in *Charles River Bridge vs. Warren Bridge*, 11 Pet. 420, 549:

"The inquiry, then, is, does the charter contain such a contract on the part of the State? Is there any such stipulation to be found in that instrument? It must be admitted on all hands that there is none; no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication, and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description, no rights are taken from the public or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purpose to convey. There are no words which import such a contract as the plaintiffs in error contend for, and none can be implied."

"Applying these well-established rules to the several contracts, it will be perceived that there was no express relinquishment of the right of taxation. The plaintiff in error must rely upon some implication and not upon any direct stipulation. In each contract there was a grant of privileges, but the grant was specifically of privileges in respect to the construction, operation, and maintenance of a street railroad. These were all that in terms were granted. As consideration for this grant the grantees were to pay something, and such payment is nowhere said to be in lieu of or as an equivalent or sub-

stitute for taxes. All that can be extracted from the language used was a grant of privileges and a payment therefor. Other words must be written into the contract before there can be found any relinquishment of the power of taxation."

H. The Circuit Court of Appeals still adheres to ["agrees with," R. 189-190; 118 F. (2d) at 231] its own former opinion in this case, of June 27, 1932 (60 F. (2d) *supra*, at p. 15) that:

"It seems to us that this act amounts to saying that in the future Fortuna Estates' right to receive the water which The People of Porto Rico contracted to deliver to them in substitution for their old water rights and concessions shall be subject to their paying the taxes in question and impairs the obligation of The People of Porto Rico to furnish Fortuna Estates water which the former agreed to deliver the latter."

But did The People of Puerto Rico agree to make that delivery forever tax free? If so, where is that agreement set forth? If not, where is the impairment?

The theory of the insular Government is that each of the plantations of the appellant *sociedad* supplied with water from the Southern Coast Irrigation System is benefited specially by the maintenance and operation of that system, at least to the amount of its *pro rata* share of the current annual cost of maintaining the service; that the facts that the contracts of 1914 specify the amounts of water these plantations are entitled to receive from the system, and that the Government agreed to deliver those amounts in lieu of the amounts which the plantations were entitled to take from the river under the old concessions, do not alter the fact that the plantations are so benefited by the improvement; that the plantations are therefore properly chargeable, by special assessment or special tax, as provided in the Act, with their *pro rata* share of such current maintenance cost.

I. Against this theory it has been urged in behalf of the appellant *sociedad* that the only benefits accruing to the plantations from the maintenance of the irrigation system

are those expressly stipulated in the contracts, for which it is claimed full payment has already been made by the temporary and conditional surrender of rights under the original water concessions. But the Government regards the question whether the lands in question are specifically benefited by the development and maintenance of the irrigation system, otherwise than to the extent of the mere delivery of the amount of water stipulated in the contracts, as one for determination by the insular Legislature in its discretion, and one which that Legislature has in effect determined by the Act of 1921.

8. In other words, the insular Government regards the Act of 1921 as constituting in effect a declaration by the Legislature that the lands therein taxed are specially benefited by the operation and maintenance of the irrigation system, at least to the extent of the taxes levied thereon by that Act; and regards this determination as one which it was within the power of the Legislature to make, and one which the courts will not disturb, at least in the absence of some showing that it is arbitrary and oppressive.⁵

The principles last above mentioned are clearly enunciated by this Court in the case of *Spencer vs. Merchant*, 125 U. S. 345.

That case involved special assessments, amounting in the aggregate to about \$100,000, for street improvements in Kings County, New York. After the improvement had been completed, and the assessments had been levied upon abutting property, and while there still remained unpaid of these assessments about \$40,000 upon various tracts, the whole

⁵ Furthermore, this interpretation of the local statute having been accepted by the insular Supreme Court in its opinion in the present case [R. 161-167], will not be overturned, unless "inescapably wrong" [*Sancho Bonet, Treasurer vs. Texas Co.*, *supra*, 308 U. S. 463, 471; *Same vs. Yabucoa Sugar Co.*, *supra*, 306 U. S. 505, 509-510], which this interpretation clearly is not. To the contrary, it is clearly correct.

proceeding was declared invalid by the courts as to those who had not paid. Thereafter the Legislature of New York passed an act directing the Board of Supervisors of Kings County to levy an assessment upon the lands abutting on said improvement which had escaped assessment by reason of the invalidity of the prior proceeding, to the exact amount of the aggregate balance remaining unpaid with interest. The land owners objected upon the ground, among others, that the second act amounted to an attempt to levy a special assessment without regard to the benefits to the lands assessed. The validity of the act was sustained by the New York Court of Appeals (100 N. Y. 585), and by this Court, which said (125 U. S. *supra*, at pp. 352-353):

“The substance of the former decisions, and the grounds of the judgment sought to be reviewed, can hardly be more compactly or forcibly stated than they have been by Judge Finch in delivering the opinion of the Court of Appeals, as follows:

“The act of 1881 determines absolutely and conclusively the amount of tax to be raised, and the property to be assessed and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. . . . The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the Act of 1881, the legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne none of the burden. In so doing, it necessarily determines two things, viz., the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they

were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must of course be final. We can see in the determination reached possible sources of error and perhaps even of injustice, but we are not at liberty to say that the tax on the property covered by the law of 1881 was imposed without reference to special benefits. The legislature practically determined that the lands described in that act were peculiarly benefited by the improvement to a certain specified amount which constituted a just proportion of the whole cost and expense, and while it may be that the process by which the result was reached was not the best obtainable, and some other might have been more accurate and just, we cannot for that reason question an enactment within the general legislative power.' "

See also *Fallbrook Irrigation District vs. Bradley*, 164 U. S. 112, 174-178, quoted by the insular Supreme Court (R. 163-167); the latter case citing with approval and following *Spencer vs. Merchant*, *supra*.

POINT II

The Acting Commissioner of the Interior of Puerto Rico, in executing the contracts of August 26, 1914, on behalf of the Government of Puerto Rico possessed no power to bind the Government to deliver the water free of any charge for the cost of delivery.

A. In executing the contracts, the Acting Commissioner of the Interior was acting on behalf of the Government of Puerto Rico solely under the authority given by Section 13 of Act No. 128 of the Legislature of Puerto Rico, approved August 8, 1913 (Appendix, *infra*, pp. 41-43), authorizing him to negotiate with the owners of old Spanish water rights or concessions which had not been relinquished or surrendered, and (Appendix, *infra*, p. 41)

"to enter into agreement with such owner or owners as to the amount of water and the time, place and

conditions of delivery thereof, which shall be delivered to the land to which the said water rights of concessions are appurtenant as the fair equivalent thereof,"

B. The Circuit Court of Appeals, in one of the earlier cases construing these contracts of August 26, 1914, in connection with the authority thus given to the Commissioner of the Interior, by virtue of which the contracts were executed, expressly held (*People of Puerto Rico vs. Russell & Co. supra* [this same respondent], 268 F. 723, 726) that:

"The power of the government officials to contract with the owners of water rights was, under this section of the statute, limited to giving in exchange for the old water rights water which would be a fair equivalent in value"; [*ante*, p. 3]

and the Circuit Court of Appeals referred with approval to that decision, in its former opinion in the present litigation (*People of Porto Rico vs. Havemeyer, supra*, 60 F. (2d) 10, 13); and does not question it in its present opinion.

It is believed that that decision was clearly right, and may now be regarded as the established law of this case.

C. The opinion of the Supreme Court of Puerto Rico in the present case is in harmony with that decision. As above quoted, the insular Supreme Court says (R. 156):

"The contracts do not say that the People of Puerto Rico bind themselves not to impose taxes. Indeed, *even if a clause like that had been included, we apprehend it would have been void.*" [*Italics supplied*]

D. This has the added authority of being the insular Supreme Court's interpretation of this local statute,—in harmony with the earlier interpretation by the Circuit Court of Appeals itself.

E. In other words, in the 1914 contracts, the parties were dealing only with the *quantum* of the water. That was the only thing the 1913 Act authorized the Commissioner to contract about. He could not and did not attempt to make any arrangements as to the cost of maintenance of the necessary irrigation equipment.

POINT III

It is axiomatic that a statute is not to be stricken down unless clearly beyond the legislative power.

As the Circuit Court of Appeals for the First Circuit itself once said, in sustaining another statute of Puerto Rico there assailed, which constituted a part of the general legislative scheme for hydroelectric development in the Island (*Gallardo vs. Porto Rico Ry. L. & Power Co.*, 18 F. (2d) 918, 923):

"doubt is not enough; it must be clearly unconstitutional to warrant the courts in holding the act void; *Green vs. Frazier*, 253 U. S. 233." (*Emphasis supplied*)

POINT IV

In any event the decision of the insular Supreme Court was not so wholly unreasonable, nor "patently erroneous", nor "inescapably wrong" as to require or justify reversal by the Circuit Court of Appeals.

A. The insular Supreme Court was here interpreting and applying insular statutes dealing with local taxation, and local water rights, in connection with local contracts originally made in the Spanish language in 1914 in relation to earlier ones of those statutes [those of 1908 and 1913], and in view of local conditions and local business practices. Clearly such a decision by the local Territorial Supreme Court should not have been disturbed by the Circuit Court of Appeals, unless, as repeatedly said by this Court, "patently erroneous" or "inescapably wrong". *Sancho Bonet, Treasurer vs. Texas Co.*, *supra*; *Sancho Bonet, Treasurer vs. Yabucoa Sugar Co.*, *supra*.

B. Particularly is this true, where, as here, the interpretation, both of the statutes and of the contracts, depended primarily upon construction of the phraseology in the Spanish language in which they were originally written, and a knowledge of the Spanish legal system from which the water rights law in Puerto Rico was originally derived. MR. JUSTICE HOLMES said, speaking for this Court, in *Diaz vs. Gonzalez*, *supra*, 261 U. S. 102, 105-106;

"This Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. * * * This is especially true in dealing with the decisions of a Court inheriting and brought up in a different system from that which prevails here. When we contemplate such a system from the outside it seems like a stone wall, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books. * * * The importance that we attribute to these considerations led to our granting the writ of certiorari and requires us to reverse the judgment below."

C. And again, this rule is particularly applicable here because this Act No. 49 of 1921 is a taxing statute. It formed a part of the general plan for the irrigation of the southern coast district of Puerto Rico, and for providing the necessary funds. As this Court said with specific reference to such taxing acts, in *Sancho Bonet, Treasurer vs. Yabucoa Sugar Co.*, *supra*, 306 U. S. 505, 510:

"Taxing acts of Puerto Rico are purely local and the traditional reluctance of this Court to overturn constructions of such local statutes by local courts is particularly applicable to interpretations of Puerto Rican statutes by Puerto Rican tribunals. Orderly development of the government of Puerto Rico as an integral part of our governmental system is well served by a careful and consistent adherence to the legislative and judicial policy of deferring to the local procedure and tribunals of the Island."

CONCLUSION

The judgment of the Supreme Court of Puerto Rico upholding Act No. 49 of 1921 was right. It certainly was not "inescapably wrong". The Circuit Court of Appeals was in error in overruling it. The question of the validity of this taxing statute, forming a part of the complicated

system of financing the development of the public hydro-electric and irrigation system of the Island of Puerto Rico, is of great importance. And as a matter of general policy, as urged in our "Reasons for Granting the Writ" [Petition, *ante*, pp. 7-8], a Territorial statute, particularly a taxing statute, sustained by the local court of last resort, should not be stricken down without the question of its validity being passed upon and settled by this Court. The writ of certiorari should be granted; the judgment of the Circuit Court of Appeals reversed; and that of the Supreme Court of Puerto Rico affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTION :

Fifth Amendment.

No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

FEDERAL :

The Organic Act for Puerto Rico, Act of March 2, 1917, c. 145, 39 Stat. 951:

Section 2.—That no law shall be enacted in Porto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws.

Section 3.—(*As amended by Act of Congress, approved March 4, 1927.*)—That no export duties shall be levied or collected on exports from Porto Rico, but taxes and assessments on property, income taxes, internal revenue, and license fees, and royalties for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by the Legislature of Porto Rico; * * *

Section 25.—That all local legislative powers in Porto Rico, except as herein otherwise provided, shall be vested in a Legislature * * * designated "the Legislature of Porto Rico".

Section 37.—That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, * * *

PUERTO RICO :

Act No. 49, approved July 8, 1921; Laws of Puerto Rico, 1921, pp. 366-370.

AN ACT

Fixing a Tax on Certain Lands Using Water From the Southern Coast Public Irrigation System, On Which Lands No Tax Whatsoever was levied under the Public Irrigation Law, And For Other Purposes.

Be it enacted by the Legislature of Porto Rico:

Section 1.—That a special tax is hereby levied in addition to other taxes already fixed by law, on all parcels of land which for irrigation purposes are supplied with water from the southern coast public irrigation system constructed and in operation pursuant to the provisions of the Public Irrigation Law and amendments thereto, but which under the present Irrigation Law in no way contribute to the payment of expenses for the maintenance of said system.

Section 2.—That the tax to be levied on each tract of land receiving water from the irrigation system, but which under the law in force does not contribute towards defraying the cost of such system, shall be classified as follows: The Treasurer of Porto Rico shall have charge of fixing the total number of acres receiving water from the irrigation system which includes: (1) tracts of lands subject to taxation pursuant to the provisions of the public irrigation law and amendments thereto, for the purpose of reimbursing the cost of the irrigation works; (2) tracts of land to which the Irrigation Commission acknowledge the right to the use of water or to which such right was acknowledged by the courts in cases of appeal, as rights acquired under the law for the use of water under prior concessions; (3) tracts of land irrigated with water delivered in accordance with acquired rights or concessions which have not been assigned, which said water, pursuant to the terms of the contracts entered into with the Commissioner of the Interior or because of decisions of the Irrigation Commission, is delivered in whole or in part and is measured at the canals of the Irrigation Service system, and such tracts shall be determined by dividing the value of the said concessions in acre-feet per year, as the same may be or shall have been fixed by the Commissioner of the Interior, by the Irrigation Commission or by decision of the courts, by four,—that is to say, by the number of acre-feet per year established by the Public Irrigation Law as a normal rate for delivery per acre for the formation of the irrigation district; (4) parcels of land irrigated by water supplied

because of acquired rights or concessions which have not been assigned, which said water, pursuant to the terms of the contracts entered into with the Commissioner of the Interior or under decisions of the Irrigation Commission, is taken and measured in the rivers at the points of intake indicated in the said concessions; and such tracts shall be determined by dividing the value of the said concessions in acre-feet per year, as the same may be or as shall have been fixed by the Commissioner of the Interior, by the Irrigation Commission or by decision of the courts in cases of appeal, by five. The Treasurer of Porto Rico shall then take amount estimated or certified to as estimated by the Commissioner of the Interior for defraying the cost of operations and maintenance of the irrigation system during the following fiscal year (as provided under Section 11 of Act 128, approved August 8, 1913, which amends the Irrigation Law approved September 18, 1908), and shall add thereto or subtract therefrom, as the case may be, any resulting deficit between or surplus over, the amount expended and certified to as expended by the Commissioner of the Interior for expenses of operation and maintenance of the irrigation system during the preceding fiscal year, and the amount estimated or certified to as estimated by the Commissioner of the Interior for defraying the cost of operation and maintenance of the irrigation system during the aforesaid preceding fiscal year. The Treasurer shall then divide the amount so determined by the total number of acres computed as hereinbefore provided, and the result shall be and shall constitute the tax per acre which shall be levied during said subsequent fiscal year on all tracts supplied with water from the southern coast public irrigation system, and which in no other manner are subject to the payment of a tax to meet the cost of the said irrigation system.

This tax shall be levied and collected by the Treasurer of Porto Rico at the same time as any other tax imposed by the Public Irrigation Law, and the moneys collected shall

be covered into the Insular Treasury to the credit of a special trust fund known as the "Irrigation Fund," to be invested in the same manner and for the same purposes provided by the Public Irrigation Law and Laws amendatory thereof.

Section 3.—All laws or parts of laws in conflict herewith are hereby repealed.

Section 4.—This Act shall take effect ninety days after its approval.

**Pertinent Extracts from an Act of the Legislature of Porto Rico
Approved September 18, 1908. Laws of 1909, pp. 152-178.**

AN ACT

To Provide for the Construction of an Irrigation System, and to Provide Revenues Therefor; for the Temporary Appropriation of Two Hundred Thousand Dollars to begin such Work, and for other Purposes.

Be it enacted by the Legislative Assembly of Porto Rico:

Section 1.—The sum of two hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any moneys in the Treasury not otherwise appropriated, for the purpose of carrying to completion the preparation of working plans and specifications for the construction of an irrigation system for the district situated approximately between the river Patillas on the east and the river Portugues on the west, and irrigable lands on both sides of both rivers and for the commencement and prosecution of the work of construction thereof, and expenses in connection therewith, until such time as sufficient funds shall be available in the Treasury from the sale of bonds provided for such purpose by legislative enactment.

Section 6.—Upon the approval of the plans, and after consultation with the engineer in charge, the Executive Council shall provide for letting the construction of the work by contract, either as a whole or in parts. The said contract or contracts shall be awarded after due call for

bids, advertised both in the Island of Porto Rico and in the United States, *provided, however*, that the Executive Council reserves the right to reject any or all bids.

Section 10.—Upon the completion of the whole or any part of the irrigation system, the Commissioner of the Interior shall provide for its maintenance and operation, and shall, with the approval of the Executive Council, make and award all necessary contracts and make the necessary by-laws, rules and regulations for patrolling and for the disposition and use of the water in the district.

Section 23.—The Irrigation Commission shall ascertain the value of all water rights and concessions which shall have been relinquished and transferred to The People of Porto Rico, and shall determine what amount will constitute a just credit on account thereof to be given upon the taxes assessed upon the lands appurtenant thereto, as distinguished from other lands not carrying any water concessions, complying in all respects with the provisions of the contracts for the relinquishment of said rights.

Section 24.—Upon the completion of the labors of the Commission, they shall transmit to the Treasurer the lists and map of the lands to be included in the Irrigation District, as decided upon by them.

They shall also transmit to the Treasurer of Porto Rico their findings as to the value of the relinquished water concessions, and the deductions from annual assessments by reason thereof.

The said Commission shall thereupon adjourn, to meet thereafter only upon call of the Governor.

Section 25.—The Treasurer shall thereupon advertise for six consecutive days in daily newspapers of general circulation . . .

Section 26.—In the ascertainment of what lands are to be included in the Irrigation District, and in estimating the value of relinquished water rights and of corresponding

deductions from the taxes assessed upon the lands by reason thereof, the decision of the said Irrigation Commission shall be *prima facie* true and correct, but any person or persons claiming to be aggrieved by the findings and conclusions shall have thirty days . . .

Section 27.—Upon all lands in the Irrigation District there shall be assessed a uniform amount per acre, upon a basis to be determined as herein provided.

Section 28.—The amount that shall be assessed and levied upon a given tract of land for any fiscal year shall be determined as follows:

The Treasurer of Porto Rico shall estimate the amount of the interest and principal or sinking fund due upon outstanding irrigation bonds for the ensuing fiscal year, plus the total amount due upon credits for the ensuing year on account of relinquished water rights; and shall add thereto the amount estimated and certified to him by the Commissioner of the Interior for the cost of maintenance and repairs for the said ensuing fiscal year. He shall then either add to or subtract from the amount so obtained the amount of any deficit or surplus, as the case may be, remaining in the Irrigation Fund from the operations of the current or prior fiscal years. He shall then add thereto an amount equivalent to five per cent of the total, as a margin of safety for delayed collections, and the amount thus determined by the Treasurer of Porto Rico shall be and constitute the total sum assessed for said fiscal year, and the same shall be and is hereby levied upon the lands in question in the proportion that the area of any particular tract of land bears to the whole number of acres irrigated. The amounts resulting from such computation shall be extended upon the tax roll for the different tracts, respectively, embraced with said district with the proper deductions therefrom in proper cases as herein provided on account of relinquished water rights. The tax roll so extended shall be completed by the Treasurer of Porto Rico on or before the 1st day of July of each year, and is hereby imposed as a charge upon

said lands in favor of The People of Porto Rico, and shall, from this date, constitute a tax, the lien of which shall be superior and prior in law to any right, claim or lien of any nature save and except the general taxes of Porto Rico as provided by law, and same shall become due and the Treasurer of Porto Rico shall proceed to the collection thereof and to the embargo and sale of the land to enforce collection thereof and in the manner and at the times now or hereafter provided by law for the collection and enforcement of other real property taxes. *Provided, however,* that in order not to inflict any unnecessary burden upon said lands during the period of construction, no assessment shall fall upon any tract of land until the part of the irrigation system in which the tract is situated has been in active operation for one year, but thereafter the said tract of land shall be liable, at the regular assessment dates, for the same proportionate assessments as would have been the case had all the lands in the District been included in the assessments for said year, under the prior provisions of this Section; *provided, further,* that payments made from the Irrigation Fund during the period of construction to meet interest or any expenses of maintenance and operation shall be assessed and refunded in the following special manner: The Auditor shall make an equal distribution thereof over the whole period of the life of the bonds and at the end of each fiscal year he shall certify to the Treasurer the amount thereof corresponding to the fiscal year to be included in the amount to be assessed under the term "deficit" as aforesaid.

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Section 34.—This Act shall be known and referred to as the Public Irrigation Law and shall take effect from and after its approval by the Governor of Porto Rico.

Pertinent Extracts from Act No. 128 of the Legislature of Porto Rico,
Approved August 8, 1913 [Laws of 1914, pp. 54-84].

AN ACT

*To Amend Certain Sections of the Public Irrigation Law,
approved September 18, 1908, as amended
and for other purposes.*

Term of office of Irrigation Commission extended. Section 1.—That the term of office of the Irrigation Commission, as at present constituted, or as hereafter constituted under the provisions hereof, insofar as the same was limited by Section 15 of the Public Irrigation Law, approved September 18, 1908, as amended March 9, 1911, be, and hereby is, extended to include such time as shall be required for the completion of the additional duties imposed upon the said Irrigation Commission by the provisions of this Act.

Section 2.—That the said Irrigation Commission shall have the power, and are hereby directed, to fix, according to the provisions hereinafter contained, the geographical boundaries of both a temporary and a permanent irrigation district; to determine what irrigable land shall be included therein; and to determine, as hereinafter provided, the value of water rights or concessions, and the basis for the computation of credits to be given on account thereof, on the taxes to be assessed as hereinafter provided upon the lands to which the said water rights or concessions are appurtenant.

.
Appeals from decisions of the Commission in connection with the permanent irrigation district. Section 10.—In the determination of what lands are to be included in the said permanent irrigation district, and of the value of relinquished water rights or concessions in connection therewith, and of the basis for the computation of credits on taxation on account thereof, the decision of the said Irrigation Commission shall be considered *prima facie* true and correct. Any person or persons, however, including The People of Porto Rico,

claiming to be aggrieved by any decision of the said Irrigation Commission as to the inclusion or exclusion of any land in or from the said permanent irrigation district, or as to the value of the said water rights or concessions in connection therewith, or as to the basis for the computation of credits on taxation on account thereof, shall have ninety days, and no longer, from and after the date of the beginning of the permanent irrigation district, as hereinbefore provided, within which time to file in the office of the Secretary of the District Court of San Juan a statement of the facts upon which such grievance is based. The District Court of San Juan shall set a time, as soon as may be thereafter, for a general hearing upon all of the questions of such grievances in one proceeding, and shall hear all such complaints filed in such court, respectively, together in one proceeding. The parties so claiming to have been aggrieved shall have the right, as in any ordinary civil proceedings, to procure the attendance of witnesses, and on behalf of The People of Porto Rico the Commissioner of the Interior shall have the right, as in any ordinary civil proceeding, to determine the matters so presented and give judgment as in a civil action, confirming, modifying or reversing the findings of the Irrigation Commission thereon. From the judgment so entered by the district court appeals shall lie to the Supreme Court of Porto Rico for the reviewing of those controversies in which the parties claiming to be aggrieved by the judgment of the said district court shall have given notice within thirty days after the filing of judgment therein that they appeal therefrom. Such an appeal may be taken by The People of Porto Rico and by any one or more of the complainants whose grievances were determined by the said district court. In case there is more than one appeal from the said district court, the said Supreme Court shall render final and conclusive judgment upon all of the said controversies; in the said appeals any of the parties affected by the said judgments, including The People of Porto Rico, shall be entitled to be heard for the purpose of securing a revision by the said Supreme Court of the judgment of

the said district court for error of law or finding of fact, the said hearings

Section 11.—The amount that shall be assessed and levied upon a given tract of land included in the permanent irrigation district shall be determined as follows:

Method and amount of taxation during the permanent irrigation district. The Treasurer of Porto Rico shall calculate the amount of the interest and principal or sinking fund due upon outstanding irrigation bonds for the ensuing fiscal year, and shall add thereto the total amount due upon credits, for the ensuing year on account of water rights or concessions; and shall further add thereto the amount estimated and certified as estimated to him by the Commissioner of the Interior for the cost of operation and maintenance of the irrigation system for the said ensuing fiscal year. He shall then either add to or subtract from the amount so obtained the estimated amount of any deficit or surplus, as the case may be, existing in connection with the Irrigation Fund from the operations of the current fiscal year. From this amount he shall subtract the amount estimated and certified as estimated to him by the Commissioner of the Interior as the receipts for the ensuing fiscal year from any water power developed in connection with the irrigation system (until such time as the total bonded indebtedness incurred on account of the irrigation system shall have been paid in full); and the amount estimated and certified as estimated to him by the Commissioner of the Interior as receipts for the ensuing fiscal year from any other sources except from the issues of bonds and from special assessments herein provided for to be levied upon the land in the permanent irrigation district. To the amount so determined the Treasurer shall add an amount equivalent to two per centum of the total as a margin of safety for delayed collections, and the amount thus determined by the Treasurer of Porto Rico, subject to the limitations and provisions hereinafter set forth, shall be and constitute the total sum assessed for the said fiscal year, and the same

shall be levied upon the lands at the time included in the permanent irrigation district (including any lands owned by The People of Porto Rico which form part of the said district, which lands shall be liable for and pay taxes levied hereunder in the same manner as the other lands included in the said irrigation district); *Provided, however, That* no deficit shall be carried over from the temporary irrigation district to the permanent irrigation district; *Provided, further, however, That* if any portion of the principal of any bonds falling due in any year cannot be paid under an assessment levied according to the provisions of this section, then the amount which cannot so be paid and for the refunding of which provision is hereinafter made, shall not be deemed a deficit in any subsequent year; *And provided, further;* That prior to the certifying by the Commissioner of the Interior of the amount thus estimated by him as receipts from water power, the Commissioner of the Interior may, if in his judgment it is advisable, deduct from the amount thus estimated by him a sum not to exceed 25 per cent of the said amount for the development and extension of the said water power.

The amount of credit on taxes to which any tract of land having a water right or concession shall be entitled on account of the relinquishment of the same shall be such percentage of such taxes as shall have been determined by the Irrigation Commission as hereinbefore provided.

No tract of land included in the permanent irrigation district shall pay any tax until it shall have received or have been offered water from the irrigation system for a period of twelve months

Assessments under the foregoing provisions shall be made upon each particular tract of land in the proportion that the area of such tract of land bears to the whole number of acres included in the said permanent irrigation district. The amounts resulting from such computation, or if such amounts exceed the amount which can be assessed under the provisions hereof, then such maximum amount as may

be assessed under the said provisions, shall be extended upon the tax roll for the different tracts at the time comprising the permanent irrigation district, after first deducting in the case of any land entitled to a credit for a water right or concession the proper credit to which the said tract of land is entitled, computed according to the provisions hereinbefore contained. The tax roll so extended shall be completed by the Treasurer of Porto Rico on or before the first day of July of each year, and is hereby imposed as a charge upon the said lands (but not as a personal liability upon the owners thereof) in favor of The People of Porto Rico, and shall constitute a tax the lien of which shall be superior and prior in law to any right, claim or lien of any other nature, save and except the general taxes of Porto Rico as provided by law, and the same shall become due and the Treasurer of Porto Rico shall proceed to the collection thereof, and to the embargo and sale of the land to enforce the collection thereof, in the manner and at the time now or hereafter provided by law for the collection and enforcement of other real property taxes except that in the case of taxes assessed for a period of less than six months as hereinbefore provided the said taxes shall be assessed, levied and collected as hereinbefore provided; *Provided, however,* That anything hereinbefore contained to the contrary notwithstanding, (1) in case any assessment for any fiscal year determined as above provided shall amount to more than fifteen dollars (\$15) per acre per annum, prior to deducting credits for relinquished water rights or concessions, then the assessment for such fiscal year shall exceed fifteen dollars (\$15) per acre per annum only to the extent that it is necessary that the assessment should exceed the said rate in order to provide for the payment of interest, operation and maintenance, the deficit of the preceding year, if any; (*Provided, however,* That no deficit shall be carried over from the temporary irrigation district to the permanent irrigation district,) and the two per centum margin of safety provided for above, plus fifty thousand dollars (\$50,000) for the payment of

the principal of bonds falling due in the said fiscal year, less the surplus, if any, of the preceding year and any estimated receipts as income from other sources, as above provided; and (2) that no tax for the payment of any part of the interest and principal due upon outstanding irrigation bonds for any fiscal year, assessed as above provided shall be paid on any tract of land which has received or has been offered, prior to the date for payment of the said tax, water from the irrigation system for more than one full fiscal year, unless the said tract of land shall have received or shall have been offered, during the preceding fiscal year, water from the irrigation system, as shown by the records of the Irrigation Service, to the amount of at least one acre foot per acre during the first six months thereof and at least one acre foot per acre during the second six months thereof; *Provided, further*, That when in the above case the said tax is due upon the first of July terminating the fiscal year to which the above test is to be applied, then the said land shall pay the said tax if it shall have received or shall have been offered water from the irrigation system during the first six months of the said fiscal year, to the amount of at least one acre foot per acre; *Provided, further*, That no tax for the payment of any part of the interest and principal due upon outstanding irrigation bonds for any fiscal year, assessed as above provided, shall be paid on any tract of land which has not, prior to the date for payment of the said tax, received or been offered water from the irrigation system for more than one full fiscal year, unless the said tract of land shall have received or shall have been offered water from the irrigation system as shown by the records of the Irrigation Service to the amount of at least one acre foot per acre during the next preceding half year (either calendar or fiscal) ending more than one month prior to the date of the said payment; *Provided, further*, however, That the foregoing exemptions from taxation conditioned upon the receipt by, or the offering to, the lands within the Irrigation district of a certain amount of water from the irrigation system shall cease to be oper-

ative and effective at such time after the beginning of the permanent irrigation district as the Chief Engineer of the Irrigation Service shall certify to the Commissioner of the Interior that each fundamental integral part of the irrigation system has been constructed.

The amount which may be included in the assessment for any one fiscal year for the payment of the principal of the bonds shall not exceed one hundred and fifty thousand dollars (\$150,000).

Effect of an appeal upon status of land and taxation. Section 12.— In case any land is included in the permanent irrigation district by the Irrigation Commission, and the owner or owners thereof, or The People of Porto Rico, shall appeal from such inclusion, the land shall be assessed and shall pay taxes at the rate and under the conditions fixed in the decision of the Commission appealed from until finally excluded by the district court or the Supreme Court. If the said land is finally so excluded the Treasurer of Porto Rico shall refund, out of the Irrigation Fund, the amount of taxes paid during the existence of the permanent irrigation district, provided the land has, during the existence of the permanent irrigation district, received no water from the irrigation system. If the said land so excluded has received water from the irrigation system during the existence of the permanent irrigation district, the Treasurer of Porto Rico shall refund out of the Irrigation Fund any amount of taxes paid by the owner of the said land during the existence of the permanent irrigation district in excess of an average of fifteen dollars (\$15) per acre per annum, prior to deducting credits for relinquished water rights or concessions. In connection herewith, and in reference to the revision and recovery of taxes assessed and collected under the provisions hereof, it shall be understood that the general tax laws of Porto Rico do not apply.

If any tract of land shall be excluded from the permanent irrigation district by the Irrigation Commission, but afterward included by virtue of an appeal either by the owner

or owners, or by The People of Porto Rico, the said land shall, after such inclusion, be assessed at the same rate as the other lands in the district, but it shall not pay any tax until it shall have had or shall have been offered water from the irrigation system for a period of twelve months.

If any tract of land, after having been included in the temporary irrigation district, shall be finally excluded from the permanent irrigation district by the Irrigation Commission, or by the district court, or by the Supreme Court, the said land shall be entitled to continue to receive water from the irrigation system up to the harvesting of the crop, if any, then growing upon the said land, and shall pay therefor at the same proportional rate of taxation and under the same conditions as the other lands in the said permanent irrigation district.

Non-relinquished water rights or concessions. Section 13.—In the case of any land carrying a water right or concession of which the source of supply is destroyed or impaired by the construction or operation of the irrigation system, which shall not have been relinquished or surrendered to The People of Porto Rico, such land shall be entitled to receive from the irrigation system an amount of water which is the reasonable equivalent in value of the said water right or concession:

Commissioner of the Interior empowered to negotiate in relation thereto. The Commissioner of the Interior is hereby authorized to negotiate with the owner or owners of such water rights or concessions, and with the owner or owners of any water rights or concessions heretofore relinquished or surrendered, on condition that the lands to which they are appurtenant should form part of the irrigation district, and which lands have not been included by the Irrigation Commission, and the said Commissioner of the Interior shall be empowered to enter into agreements with such owner or owners as to the amount of water and the time, place and conditions of delivery thereof, which shall be delivered to the land to which the said water rights or concessions are

appurtenant as the fair equivalent in value thereof, with the power on behalf of the Irrigation Service to enter into agreement with such owner or owners for the relinquishment to The People of Porto Rico of such water rights or concessions, and for the delivery to the lands to which the said water rights or concessions are appurtenant of such fair equivalent. Before entering into such agreement the Commissioner of the Interior shall consult the Attorney General of Porto Rico as to the validity and legal status of the water rights or concessions involved.

Powers of Commission in relation thereto. In the case of any water right or concession in connection with which no such contract or agreement is made prior to January 1, 1914, the Irrigation Commission shall have the power to decide as to the validity and the legal status of any such water right or concession, and in the case of valid and subsisting water rights or concessions to determine what amount of water must be delivered by the Irrigation Service to the lands to which such water rights or concessions are appurtenant.

Rights of appeal in relation thereto. Any owner or owners of any lands carrying water rights or concessions aggrieved by any such decision of the said Irrigation Commission, or the Attorney General of Porto Rico on behalf of The People of Porto Rico, may appeal from the said decision to the district court of the district in which the said land is situated. The said appeal may be taken at any time within, and not after ninety (90) days from the date of the beginning of the temporary irrigation district if the said decision is made by the Irrigation Commission in connection with the formation of the temporary irrigation district, and within and not after ninety (90) days from the date of the beginning of the permanent irrigation district if the said decision is made by the Irrigation Commission in connection with the formation of the permanent irrigation district. An appeal may be taken to the Supreme Court of Porto Rico by any party, including The People of Porto Rico, aggrieved

by the decision of the district court made as provided in this section, within thirty (30) days after the rendering of the said decision. Pending the final determination of the questions involved in any appeal taken under the provisions of this section, the decision of the said Irrigation Commission shall be binding both upon the Irrigation Service and the owner or owners of the water rights or concessions involved.

Standard of water. Section 18.—The amount of water which shall be set as a standard for the establishment of both the temporary and permanent irrigation districts shall be four acre feet per acre per annum, the said standard to be applied on the basis of fair average years.

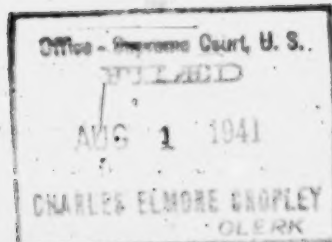
Repeal of former laws. Section 36.—That sections 21, 23, 24, 25, 26, 27, 28 and 30 of the Public Irrigation Law, approved September 18, 1908, as amended by subsequent enactments be and the same hereby are, repealed; that sections 7 and 8 of the Act amending the Public Irrigation Law, approved March 9, 1911, be repealed; that all other parts of the Public Irrigation Law and of the Act amending and amplifying said law, approved March 9, 1911, and all other laws and parts of laws, in conflict with this Act, be and the same hereby are, repealed.

Section 37.—This Act shall take effect immediately upon its approval.

Approved, August 8, 1913.



FILE COPY



IN THE
Supreme Court of the United States

OCTOBER TERM, 1941

No. 95

THE PEOPLE OF PUERTO RICO,
Petitioner,
vs.

RUSSELL & Co., S. EN C.,
Respondent.

REPLY BRIEF FOR PETITIONER,
IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Very little reply seems necessary. The essentials appear plain.

1. The insular executive authorities negotiating the 1914 contracts possessed no power to deal with anything except the *quantum* of the water to be delivered. The Circuit Court of appeals so held in construing the contracts twenty years ago,¹ and such was likewise the insular Supreme Court's interpretation of the 1913 statute under which the contracts were made (R. 156).

2. The insular officials did not try to do anything more. That is the insular Supreme Court's interpretation of these contracts, originally drawn in the Spanish language. The contracts say nothing whatever about the cost of delivering

¹ *People of Porto Rico v. Russell & Co.*, 268 Fed. 723, 726; Petition for Certiorari, p. 3.

the water, or about taxes. As the insular Supreme Court says (R. 156, *supra*; Petition, p. 3):

"even if a clause like that had been included, we apprehend that it would have been void." (C.)

3. That interpretation of the contracts by the insular Supreme Court is not only in harmony with the limitations on the powers of the executive officials making them under the authority conferred by the Act of 1913, and with the language of the contracts themselves, but is also in harmony with the general doctrine that, as against the government, a contract is not to be extended beyond its express terms [*Confer*, Petition, p. 12, and authorities cited]. The applicability of this doctrine is not questioned by respondent.

4. Plainly, the insular Supreme Court's interpretation of these local contracts originally drawn in the Spanish language, and made pursuant to the limitations imposed upon the powers of the insular officials making them by the local insular statute of 1913, is not an unreasonable interpretation. Certainly, to say the very least of it, it is surely not so "patently erroneous", nor so "inescapably wrong", as to authorize the Circuit Court of Appeals to override it (*Sancho Bonet, Treasurer vs. Texas Co.*, 308 U. S. 463, 471; *Same vs. Yabucoa Sugar Co.*, 306 U. S. 505, 509-511), particularly in view of the fact that it is an interpretation of contracts originally drawn in the Spanish language and dealing with rights arising out of the ancient Spanish water rights law system (*Diaz vs. Gonzalez*, 261 U. S. 102, 105-106).²

5. This is reinforced by a consideration of the general doctrine that, as between two possible interpretations of a statute,—or of a contract upon the interpretation of which the validity of a statute depends, as here,—that interpretation is to be preferred which will sustain the validity of the statute.

²*Confer*, Petition for Certiorari, pp. 23-24.

6. Upon the other branch of respondent's contention below, upon which the Circuit Court of Appeals found it "unnecessary to pass" (R. 191; 118 F. (2d) 225, 231), viz., the contention that "there was an undue delegation of legislative power to the Commissioner of the Interior in the computation of the tax",—which was carefully considered and overruled by the insular Supreme Court, interpreting this local statute otherwise on that point (*Opinion*, R. 151-156),³—respondent's brief (pp. 9-11) presents nothing showing any unreasonableness whatever in the insular Supreme Court's interpretation of this phase of the statute.

7. The other contentions presented by respondent below, and adverted to by it here (*Brief*, pp. 12-16) were overruled by the insular Supreme Court; and were disregarded by the Circuit Court of Appeals. The concessionaires' water rights under the old Spanish concessions were not touched in any way, either by the statutes of 1908, 1913, or 1921, or by the contracts; and, plainly, respondents were never denied opportunity to be heard.

8. Respondent questions (*Brief*, "VII", pp. 16-17) our suggestion (*Petition*, "*Reasons for Granting the Writ*", pp. 7-8) that in such a case as this, involving the validity of a Territorial statute where its validity turns upon its interpretation and the interpretation of local contracts, and its validity has been upheld by the local court of last resort upon that court's interpretation of the statute and the contracts,⁴ and the local Supreme Court's interpretation of the statutes and the contracts have been overruled by the Circuit

³ *Confer*, *Petition for Certiorari*, note 4, pp. 5-6. As there pointed out, the insular Supreme Court, as to this point, interprets the insular statute in question, Act No. 49 of 1921, as delegating only administrative, and not legislative, powers. The interpretation appears to be wholly reasonable.

⁴ And particularly where, as here, it rests upon the local interpretation of contracts and statutes originally made in the Spanish language, and in view of the system of local laws inherited from Spain.

Court of Appeals, resulting in the Circuit Court of Appeals striking down the Territorial statute,—that in such a case, almost as a matter of course, this Court might well make a practice of granting certiorari, and of not allowing a Territorial statute to be stricken down upon the Circuit Court's overruling of the local interpretation of the contracts and the statute, without a re-examination by this Court; in analogy in a general way with the requirement of paragraph (b) of Section 240 of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 939, with relation to cases involving the striking down of State statutes.

It is confidently submitted that, as submitted in our Petition, in such a case an act of the Territorial Legislature should not,—in reasonable consideration of the respect to be shown both to the presumption of the validity of an enactment of the Legislature and also to the presumption of the correctness of the local Territorial Supreme Court's interpretation of local statutes and contracts,—be stricken down, without examination by this Court.

It is therefore very earnestly believed by the insular government that certiorari should issue in this case.

Respectfully submitted,

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GEORGE A. MALCOLM,
Attorney General of Puerto Rico

NATHAN R. MARGOLD,
Solicitor for the Department of the Interior,
Of Counsel.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1941

No. 95

THE PEOPLE OF PUERTO RICO,

Petitioner,

vs.

RUSSELL & CO., S. EN C.,

Respondent.

REPLY BRIEF FOR PETITIONER,
IN REPLY TO "BRIEF FOR RESPONDENT"

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1941

No. 95

THE PEOPLE OF PUERTO RICO,

Petitioner,

vs.

RUSSELL & Co., S. EN C.,

Respondent.

REPLY-BRIEF FOR PETITIONER,
IN REPLY TO "BRIEF FOR RESPONDENT"

I.

As to the supposed "impairment of contract".

Respondent's argument misses the point. Of course there is no question, and never has been in this case, on the part of the Government of Puerto Rico, that the Legislature has no power,—and certainly no desire,—to impair, or to escape from the just application of, the 1914 contracts,—nor any others properly made on its behalf. Of course it is beyond the power of the Legislature of Puerto Rico, or of any other department of that government, to impair its contracts. Of course, if,—properly construed,—the effect of the 1921 statute had been to impair the obligation of the 1914 contracts,—properly construed,—then, in so far as it did so, it would

have been beyond the powers granted the Legislature by the Congress under the Organic Act. No one questions that. The Government of Puerto Rico has never questioned it in this litigation. On the contrary, it was said in the brief for the *People of Puerto Rico* filed in this Court in support of its petition for certiorari on the earlier hearing of this litigation here (Case No. 492, October Term, 1932, pp. 39-40):

"Your petitioner recognizes the soundness and force of those principles wherever they are applicable, and is more than willing that its actions under review in this case, as well as in all other connections, shall be judged according to the standard suggested in the opinion of this court in *Woodruff v. Trapnall*, 10 How. 190, 207; that is, 'to be characterized by a more scrupulous regard for justice and a higher morality than belong to the ordinary transactions of individuals.'"

That has consistently been the attitude of the Government throughout this litigation. It is re-stated again, in what was intended to be identically the same language, in our Brief in Support of our Petition for Certiorari in the present case (POINT I-B, pp. 10-11). The whole question is as to the true meaning and proper construction of the 1914 contracts. That is plainly a question of local law, primarily for determination by the local insular courts.

As we said in our "Reply Brief for Petitioner, In Reply to Respondent's Brief in Opposition," heretofore filed herein:

The Essentials Appear Plain

1. The insular executive authorities negotiating the 1914 contracts possessed no power to deal with anything except the *quantum* of the water to be delivered. The Circuit Court of Appeals so held in construing the contracts twenty years ago;¹ and such was likewise the insular Supreme Court's interpretation of the 1913 statute under which the contracts were made (R. 156).

¹ *People of Porto Rico v. Russell Co.*, 268 Fed. 723, 726; Petition for Certiorari, p. 3.

2. The insular officials did not try to do anything more. That is the insular Supreme Court's interpretation of these contracts, originally drawn in the Spanish language. The contracts say nothing whatever about the cost of delivering the water, or about taxes. As the insular Supreme Court says (R. 156, *supra*; Petition, p. 3):

"even if a clause like that had been included, we apprehend that it would have been void."

3. That interpretation of the contracts by the insular Supreme Court is not only in harmony with the limitations on the powers of the executive officials making them under the authority conferred by the Act of 1913, and with the language of the contracts themselves, but is also in harmony with the general doctrine that, as against the government, a contract is not to be extended beyond its express terms [*Confer*, Petition, p. 12, and authorities cited]. The applicability of this doctrine is not questioned by respondent.

4. Plainly, the insular Supreme Court's interpretation of these local contracts originally drawn in the Spanish language, and made pursuant to the limitations imposed upon the powers of the insular officials making them by the local insular statute of 1913, is not an unreasonable interpretation. Certainly, to say the very least of it, it is surely not so "patently erroneous", nor so "inescapably wrong", as to authorize the Circuit Court of Appeals to override it (*Sancho Bonet, Treasurer vs. Texas Co.*, 308 U. S. 463, 471; *Same vs. Yabucoa Sugar Co.*, 306 U. S. 505, 509-511), particularly in view of the fact that it is an interpretation of contracts originally drawn in the Spanish language and dealing with rights arising out of the ancient Spanish water rights law system (*Diaz vs. Gonzales*, 261 U. S. 102, 105-106).²

5. This is re-inforced by a consideration of the general doctrine that, as between two possible interpretations of a statute,—or of a contract upon the interpretation of which the validity of a statute depends, as

² *Confer*, Petition for Certiorari, pp. 23-24.

here,—that interpretation is to be preferred which will sustain the validity of the statute.

II.

Act No. 49 of 1921 does not contain any undue delegation of legislative power to administrative officials.

Respondent's argument on this point (Brief, pp. 23-27) is plainly mistaken.

A. The insular Supreme Court overruled this contention. It held (R. 151, 154, 156):

"As to the undue delegation of powers, we think that there is none. The Commissioner of the Interior fixes the water charges each year by performing a definite calculation. Even if the statute did not so specifically determine the computation of the charges we would not hold it an undue delegation of power.

"The Courts have upheld the validity of statutes authorizing irrigation districts and other districts organized for the same purpose, to levy taxes and assessments, and such statutes do not fall within constitutional provisions regulating assessment and collection of taxes for general state purposes.' 67 C.J. 1337, par. 925.

"The text is supported by *Fallbrook Irr. Dist. v. Bradley*, 17 Sup. Ct. 56, 164 U. S. 112, 41 L. Ed. 369; *Turlock Irr. Dist. v. Williams*, 79 Cal. 360, 18 P. 379. (R. 151) • • •

"As we shall see later from the Act itself, what the Commissioner does is to fill in details. (R. 154) • • •

"If the estimate is too high or too low, a surplus or a deficit will result. A surplus will be credited to the budget of the following year, thereby reducing the tax; a deficit will be added to the budget of the following year. Thus, any error committed by the commissioner will be automatically corrected when the next budget is prepared. It will be seen that the Commissioner's discretion does not play an important part in the computation of the tax. Indeed, the commissioner's role could be eliminated and the cost of maintenance estimated some other way. For example, the budget of a previous year to be taken as tentative for the following one.

Such a procedure is followed in estimating the premium rates for the State Insurance Fund?

"The landowner pays the tax in the computation of which the commissioner's report is used. But since any difference between that estimate and the real cost of maintenance is adjusted the landowner is really paying for the exact cost of maintenance.

"Furthermore, it has not been charged, or even suggested that the commissioner's estimates are unjust, or confiscatory.

"We hold, therefore, that the act contains no undue delegation of powers." (R. 156)

The insular Supreme Court thus interprets this local statute as delegating only administrative rather than legislative power.

The Circuit Court of Appeals considered it "unnecessary to pass upon" this question, in view of its decision upon the other branch of the case (R. 191; *Petition for Certiorari*, p. 5, foot-note 4).

B. This interpretation of the statute by the insular Supreme Court is wholly in accord with the applicable decisions of this Court and of other courts of the United States. There is no doubt whatever that the power of taxation is a legislative power which cannot be delegated to administrative or executive officials. It is also true that in a general sense the fixing of the amount of a tax levy is part of the legislative function involved in the process of taxation.

But the fixing of the amount of the levy according to this principle does not necessarily nor usually imply the precise determination and specification of the exact sum to be raised. *The condition is met if the law sufficiently indicates the rules and data to be employed to govern determination of the exact amount, so as to leave to executive officials substantially nothing more than the finding of facts and the making of mathematical computations.* This, we think, is all that is done by Act No. 49 of 1921, if the Act is properly interpreted according to its purpose and intent, as it is interpreted by the insular Supreme Court [R. 151; 151-156;

154-156; *supra*]. As that court holds [R. 154]: "What the Commissioner does is to fill in details."

C. When Act No. 49 was enacted in 1921, the irrigation system to which it refers had been in existence and operating for more than six years. At that time it was and ever since has been a well-defined entity whose nature, extent, organization, operating crew and condition were and are firmly established and well known. The function of determining annually in advance the approximate reasonable and necessary cost of maintaining and operating the system for each succeeding fiscal year was and is, therefore, mainly administrative, involving no legislative discretion, but merely the ascertainment of the facts of previous experience and existing conditions, itemized computations of the amounts and costs of labor and material needed for the following year, and the final summing up of items to find the approximate aggregate amount needed. It seems obvious that the Legislature could not reasonably be expected to concern itself with detailed *minutiae* to the extent necessary to formulate the required estimate for each year; and that when it turned the detailed computations over to the Commissioner of the Interior in the manner provided by the Act it adopted a very reasonable and proper solution of the problem, and one which is in harmony with the almost universal practice throughout the United States in dealing with similar problems.

D. It must be noted in this connection, as the instar Supreme Court does [R. 156, *supra*], that the Legislature provided in the same enactment a more or less automatic check against the possibility of excessive levies by prescribing that any surplus realized in the experience of the preceding year must be deducted in computing the levy for the following year. It should also be noted that the Act in effect forbids inclusions in the estimate of any expense for new construction, by providing that the estimate shall include only "expense of maintaining and operating." Interpreted

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according to the rules of statutory construction the words last quoted must be taken to mean only the expenses of maintenance and operation that are necessary and reasonable.

E. These are all general limitations upon the authority delegated by the Act to the Insular Treasurer and the Commissioner of the Interior. Their joint effect is to leave to those officials very little, if anything, more than the mere finding of facts and mathematical computations. In the required estimate the Commissioner of the Interior can include only necessary and reasonable items of actual cost of maintaining and operating an existing plant. If these limitations are exceeded, then the taxpayer can assert his rights and obtain correction of the assessment by appeal to the insular Board of Review and Equalization under Sections 308 and 310 of the insular Political Code. (Compilation of the Revised Statutes and Codes of Puerto Rico in force on March 9, 1911, Sections 2960 and 2962).

F. Special taxes or assessments, such as those here involved, although imposed under the taxing power of the Government, are governed by principles somewhat different in various particulars, in relation to this question, from those which affect general taxation. *Cooley on Taxation*, 4th Ed., Vol. 1, Sec. 31. In the case of a general tax it is usually practicable for the legislative authority to fix precisely either the aggregate amount to be raised by the tax and thus indirectly the rate of taxation, or else directly to fix the rate of taxation, thus indirectly establishing the aggregate amount to be levied. In the case of special taxes or special assessments for local improvements directed by statute or ordinance, it is rarely practicable precisely to determine in the statute or ordinance directing the improvement and authorizing the levy either the precise amount to be raised or the rate of apportionment. In such cases the quite universal practice throughout the United States has always been to delegate the function of fixing these exact figures to commissioners, boards and administrative officials.

Taxation by Assessment, Page and Jones, Vol. 1; Sec. 267, and cases cited.

Fallbrook Irrigation District vs. Bradley, supra, 164 U. S. 112, 151, et seq.

Lombard vs. West Chicago Park Co., 181 U. S. 33.

French vs. Barber Asphalt Paving Co., 181 U. S. 324.

Wagner vs. Baltimore, 239 U. S. 207, 211, et seq.

Milheim vs. Moffat Tunnel Dist., 262 U. S. 710.

Kansas City Ry. vs. Road District, 266 U. S. 379.

G. Each of the cases last above cited involves a statute or ordinance providing for special assessments for the cost of local improvements where the precise amount to be levied was left for determination by administrative action under general limitations. In each of those cases the validity of the statute or ordinance in question was sustained; and, although it does not appear that in any of them the statute or ordinance was attacked on the specific ground that it delegated legislative authority to administrative officials, the absence of any such attack or even discussion of such a question in the opinions in those cases tends strongly to support the conclusion that the statutes and ordinances there involved were not regarded either by the attacking parties, or by the courts, as subject to objection on the ground of improper delegation of legislative authority.

H. To the same effect are the other cases cited on this branch of the case in the opinion of the insular Supreme Court [R. 151-154].

I. The list of authorities last above cited might be extended almost indefinitely by taking cases decided by the courts of last resort in the various States. The practice is so well settled and of such long standing that we do not deem it necessary in this brief to extend the discussion on this point beyond what has already been said, further than to note the attitude of one of the State appellate courts, as disclosed in the cases next mentioned.

In *Mayor, etc., of Baltimore vs. State*, 15 Md. 376, 74 Am.

Dec. 572, the Supreme Court of Maryland was called upon to decide the validity of an act of that State conferring upon a board of police commissioners authority to estimate what sum of money would be necessary to enable them to discharge the duties imposed upon them, and obliging the mayor and city council to raise, by assessment and levy upon assessable property of the city, the sum thus estimated by the board. It was urged that this statute constituted an improper delegation of legislative authority, but the court upheld the validity of the statute against this attack and said (15 Md., *supra*, at pp. 467, 468; 74 Am. Dec., *supra*, at p. 588):

"Under the old system of levy courts and tax commissioners, when appointed by the executive, it was never said that they had not power to make assessments and levy taxes. They were not elected by the people nor accountable to them. They were appointed under legislative authority by the executive, and the state exercised its supreme power of taxing the people through their agency. So here, the state chooses to substitute commissioners in the place of the city authorities for the purpose of levying this tax, and we see no sufficient reason for denouncing the law on that account. That such a power may be delegated, see *Burgess vs. Pue*, 2 Gill, 11."

And the same court, considering a similar question with relation to unusual powers conferred upon the State Board of Health by an act of the Maryland Legislature, said in a later case [*Welch vs. Cogan*, 126 Md. 1; 94 Atl. 384, 388]:

"The rule as laid down by the many text-writers is to the effect that the power to tax is inherently a legislative function, to be exercised only by that department of the government, and that it can be delegated only to municipal corporations. 37 Cyc. 725; Cooley on Taxation (2d Ed.) 61, 63, 65. And some of the decisions ably support this view. * * * *Van Cleve vs. Passaic Valley Sewerage Commissioners*, 71 N. J. Law, 574 * * *

"But the proposition of law is by no means as broad as its language might be taken to imply, and in numerous instances authority conferred by Legislatures upon

school boards and school commissioners to fix the amount of the tax to be levied for the maintenance of schools has been sustained.

"The rule in this state is that laid down in *Baltimore vs. State* [*supra*], 15 Md. 376, 74 Am. Dec. 572."

J. It follows that at the time of the enactment of the Organic Act for Puerto Rico, March 2, 1917, it had been the almost universal custom throughout this country from the beginning of its history, in ordinances and statutes providing for local improvements, to delegate the function of precisely fixing the aggregate amounts of the assessments against benefited lands, to administrative commissions, boards and officials. When the Congress by Section 25 of that Organic Act (39 Stat. 951, 958) delegated to the Legislature of Puerto Rico "all local legislative powers in Puerto Rico," it must have been with the expectation and intention that the insular Legislature would thereby be empowered to follow the same practice and method with relation to such assessments.

K. The cases cited by the Respondent (*Brief*, pp. 24-26) fail to support it here. Thus, for example, in the case of *Rich Hill Coal Company vs. Bashore*, 334 Pa. 449, 498, 7 Atl. (2d) 302 (*Brief*, pp. 25-26), the Legislature had attempted to empower the State Department of Labor and Industry to levy a tax or assessment upon all employers in the State, for the purpose of defraying the cost of administering the Act, but had failed to prescribe any definite rule to guide the Department in determining the amount of the assessment, or to restrict it to employers benefited. The State Supreme Court found it to be in effect simply a *general tax*, "levied in varying amounts at the discretion of the department."

So also the case of *Van Cleve vs. Passaic Valley Sewerage Commissioners*, *supra*, 71 N. J. Law 574, 60 Atl. 214, likewise quoted and relied upon by the Respondent (*Brief*, p. 26), is equally clearly distinguishable from the present case. In that case the State statute there under consideration

purported to delegate to an administrative board power to incur an indebtedness against the lands in a sewer district in any amount not in excess of nine million dollars and to levy annually a tax of unlimited amount upon the property in the district for the purposes of amortization of said indebtedness and maintenance of the sewer system to be constructed. The sewer system was not only not in existence at the time of the attempted delegation of this power to the board, but its nature, extent and purposes were described only in the most general terms without any tangible limitation, express or implied, other than the \$9,000,000 maximum, upon the discretion attempted to be conferred upon the board. As above pointed out, such conditions are not present in the case here under consideration. The system whose annual cost of operation and maintenance the Commissioner of the Interior is here empowered to estimate was already in existence, and had been in actual operation for a number of years. Computations of its cost of operation and maintenance involve only fact finding and mathematical computation.

L. This particular point is of especial importance to the appellee The People of Puerto Rico; because, if the present decision of the insular Supreme Court were to be reversed, it would tend to upset the whole system of established practice that has been followed for more than 25 years, in the imposition and collection from many taxpayers of special assessments for the maintenance and operation of the Southern Coast Irrigation District, doubtless with resultant suits for repayments of moneys heretofore collected and expended.

III.

The Act of 1921 does not affect respondent's rights under the Treaty of Paris in any way.

Respondent's argument on this point ("Brief for Respondent", "III", pp. 27-29) is plainly founded on respondent's mistaken assumption that the Act impaired its rights

under the 1914 contracts. Since it does not do so, it does not affect its concessionaire rights under the treaty in any way.

IV.

The Act of 1921 certainly does not deprive respondent of an opportunity for a hearing before the taxes become fixed, in any way.

Respondent's contention here is really not understood. It has never been sustained by any court. Respondent has never complained, actually, at any time, apparently, of any particular tax, on that ground. The statute grants the same opportunity for a hearing as with relation to any other tax (Sec. 2, Act No. 49, *Appendix to Petition for Certiorari*, p. 29).

V.

The Act of 1921 does not violate the requirement of Section 2 of the Organic Act that: "The rule of taxation in Puerto Rico shall be uniform".

Here again respondent's contention has never been sustained by any court below. It is in effect a contention for universality, not uniformity, in taxation. The same contention was made with relation to this same provision of the Organic Act by the Porto Rico Railway Light & Power Co., back in 1926, and was overruled by the Circuit of Appeals for the First Circuit, in the case of *Gallardo, Treasurer vs. Porto Rico Ry. Light & Power Co.*, 18 F. (2d) 918, 923-925.

In that case substantially the same objection was made by the light and power company, to that tax, which is now sought to be made on this point by the respondent here, viz., that the tax as laid by the Legislature was not laid upon all of the objects to which the Legislature might have subjected it, but that the Legislature,—for obvious reasons there, as for obvious reasons here,—had in levying that tax levied it only upon all lands in the island of Puerto Rico, but not upon personal property, and not upon either lands or personal property in the adjacent islands of Vieques and Culebra. The objection here is, analogously,

that in levying this tax the Legislature has levied it only upon the particular properties which for manifest reasons were equitably proper subjects for it, in view of the benefits, and has not levied it on other property. In that case, just as the respondent (*Brief*, p. 31) now does here, the company relied upon the decision of this Court in the old case of *Gilman vs. City of Sheboygan*, 2 Black 510, 517, in which this Court in a case arising in Wisconsin applied the established rule that this Court considers itself bound in relation to the interpretation of a State statute or constitution by the interpretation placed upon it by the local State Supreme Court, and accordingly enforced the interpretation which the Wisconsin Supreme Court had there placed upon the Wisconsin Constitution as providing for not only uniformity, but also *universality*, of taxation in that State.

But the Circuit Court of Appeals, in the *Railway Light and Power Company* case, overruled the company's contention and in upholding the validity of the Puerto Rican statute there involved, pointed out the company's mistake in its interpretation of this Court's decision in the *Gilman vs. Sheboygan* case, saying (*Gallardo vs. Porto Rico Ry. Light & Power Co.*, *supra*, 18 F. (2d) at p. 924):

"The plaintiff's chief reliance is *Gilman vs. Sheboygan*, 2 Black, 510, 17 L. Ed. 305. As the Supreme Court held itself bound (2 Black, 518) by the construction put on the Wisconsin Constitution by the Wisconsin court of last resort, the mere affirmation by that court gives the decision no additional weight; it is in legal effect but a decision, many years ago, of the Supreme Court of Wisconsin. In *Lund vs. Chippewa County*, 93 Wis. 640, 67 N. W. 927, 34 L. R. A. 131, the Wisconsin court held that 'the rule of uniformity is not broken merely because a town or city or county raises a special tax for local purposes.' The reasoning of this opinion, made in 1896, is hardly consistent with the rather technical interpretation of the Constitution made in *Gilman vs. Sheboygan* and in *Knowlton vs. Supervisors*, 9 Wis. 410, a generation earlier. *State vs. Supervisors*, 70 Wis. 485, 36 N. W. 396, accords with the later views

of that court. *Cf. Florida Central & P. R. Co. vs. Reynolds*, 183 U. S. 471, 480, 22 S. Ct. 176; 46 L. Ed. 283."

CONCLUSION

The case turns on the construction of the 1914 contracts, and of the powers of the local officials making them under the local Act of 1913. That is a question purely of local law. The Territorial Supreme Court holds that those contracts deal only with fixing the *quantum* of Respondent's fair share of the water, and that they do not bind the government to bear the cost of its delivery; and that the officials making them had no authority to deal with the latter subject, and did not attempt to do so. [Whence it necessarily follows that they were not impaired in any way by the 1921 Act requiring Respondent to pay its fair share of the cost of such delivery.]

That decision of the insular Supreme Court thus interpreting the 1914 contracts [with the local Act of 1913 under which they were made] was clearly right, and was certainly not "inescapably wrong". The decision of the Circuit Court of Appeals reversing it was in error. None of respondent's other points is good. The judgment of the Circuit Court of Appeals should be reversed, and that of the insular Supreme Court should be affirmed.

Respectfully submitted,

WILLIAM CATTRON RIGBY,
Attorney for Petitioner.

GEORGE A. MALCOLM,
Attorney General of Puerto Rico,

NATHAN R. MARGOLD,
Solicitor for the Department of the Interior,
Counsel

IN THE
Supreme Court of the United States

OCTOBER TERM, 1941

No. 95

THE PEOPLE OF PUERTO RICO,

Petitioner.

vs.

RUSSELL & Co., S. ON C.,

Respondent.

CLOSING PORTION OF ORAL ARGUMENT FOR PETITIONER

(Second day, Tuesday, February 4, 1942)

WILLIAM CATTEON RIGBY,

Attorney for Petitioner.

GEORGE A. MALCOLM,

Attorney General of Puerto Rico.

NATHAN R. MARGOLD,

*Solicitor for the Department of the Interior,
Of Counsel.*

IN THE
Supreme Court of the United States

No. 95

OCTOBER TERM, 1941

THE PEOPLE OF PUERTO RICO,
Petitioner,

vs.

RUSSELL & Co., S. en C.,
Respondent.

Washington, D. C.,
Wednesday, February 4, 1942.

Oral argument in the above entitled matter was resumed before the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States, at 12:05 o'clock p.m.

APPEARANCES:

On behalf of the Petitioner,
THE PEOPLE OF PUERTO RICO,
WILLIAM CATTRON RIGBY, Esq.

On behalf of the Respondent,
RUSSELL & Co., S. en C.,
GEORGE M. WOLFSON, Esq.

PROCEEDINGS

THE CHIEF JUSTICE: Proceed with the cause on argument.

THE CLERK: Counsel are present.

ARGUMENT OF COLONEL WILLIAM CATTRON RIGBY,
ON BEHALF OF THE PETITIONER, THE PEOPLE OF
PUERTO RICO (resumed):

(The previous day's oral argument not being reported.)

MR. RIGBY: May it please the Court, I find that I need to make one little correction in what I said. The Court asked me whether this former case of People of Puerto Rico against Russell & Company—the Fortuna Estates case, rather; the Fortuna Estates case in 268 Federal, had gone to this Court. I said I thought it had, and had gone off on the question of jurisdiction. I find I was mistaken. That case for some reason never came up here.

The case that I had in mind was another case brought up at the same 1921 term of this Court, also a Fortuna Estates case, in which the question was presented, and the only question presented there was whether the sociedad en comandita was to be considered a corporation for the purpose of Federal jurisdiction. Certiorari was denied at that time. Afterwards the same question came up in this case on the formal hearing and this Court, reversing the prior decisions, held that it is a corporation for the purpose of Federal jurisdiction. So for the first time in this litigation the Insular Supreme Court got a chance to express its opinion of the meaning of the contract when the case went back there.

Now, as to the reasonableness of the opinion of the Insular Supreme Court, construing these 1914 contracts and holding that the use of the word “delivery” does not necessarily imply that the People of Puerto Rico were contracting to bear the expense of getting the water to the places where it was to be made available—

THE CHIEF JUSTICE: Now, will you explain why, if delivery was to be the compensation, the compensation for the water which they were entitled to?

MR. RIGBY: I want to try to, in a few words.

In the first place, the water that was given to them before was a matter that lay in grants, and this contract necessarily also was in the nature of a grant. Because under the Law of Waters, the old Spanish Law of Waters in force prior to that time, when those old concessions were given, in force when the contracts were made and still in force,

it provides that "authority"—this is Article 147 of the Law of Waters, if I may add it to my citations—

THE CHIEF JUSTICE: Not printed?

MR. RIGBY: Not printed. If I may be permitted to, I will add it in.

THE CHIEF JUSTICE: If you will file copies; nine copies.

MR. RIGBY: I will be glad to. This is Section 2533 of the Revised Statutes of Puerto Rico. It provides:

"Authority is necessary for the use of public waters especially destined to enterprises of public or private interest, excepting in the cases mentioned in Articles six, one hundred seventy-four, one hundred seventy-seven and one hundred eighty-four of this law."

Which exceptions, I may say, have nothing to do with this case.

Then Article 184 of the same Law of Waters, which is Section 2570 of the Revised Statutes, provides:

"In navigable rivers the riparian owners may without restriction place on their respective margins pumps or any other device for obtaining the water necessary for the irrigation of their estates abutting thereon, provided they do not interfere with navigation. In other public rivers"—

That is, those that are not navigable. And without question this Jacaguas River is not a navigable river.

THE CHIEF JUSTICE: Is it a public river?

MR. RIGBY: It is a public river.

"In other public rivers the authority of the Governor of the Province shall be necessary."

So that this refers to that claim for the right to take it, to put in the pumps and to take the water.

THE CHIEF JUSTICE: Now, that had been given, the permission had been?

MR. RIGBY: The permission had been given, and they claimed it.

THE CHIEF JUSTICE: And in order to avail themselves of the water all that was necessary for them was to take it when it was flowing down the stream?

MR. RIGBY: Yes. To put in the pumps and to pay the expense, whatever it might be, of taking it from time to time.

THE CHIEF JUSTICE: Now, this expense that was involved was the expense of putting in pumps or taking the water that arrived at the land of the claimant?

MR. RIGBY: It is an expense for carrying it to that point, whatever the ditches might cost to get it there.

THE CHIEF JUSTICE: And that expense, as I understand it, was incurred in order to insure a regular flow?

MR. RIGBY: Precisely. Not only the regular flow—

THE CHIEF JUSTICE: And the amount which was to be determined here was the amount of the regular flow which would compensate for the larger volume of irregular flow; is that right?

MR. RIGBY: The claimant got water from different places of distribution. You see, under the old concessions along the Jacaguas River there were a great many little land owners in the early days, and each one of those had gotten a concession to take not exceeding so much water, which he could use on that particular land, and only of course on that particular land. And in the course of years the total of those concessions naturally had amounted to considerably more than the flow of the river. So that it became necessary to provide for priorities as to the taking; and that was done.

That situation led to the necessity of putting in some kind of public irrigation system because, as I said, the total rainfall over on the south side is only about half the amount necessary annually for the cultivation of cane. It takes about 96 inches of rain on the average annually, as I understand it, and while on the north side there is something like 100 inches of rainfall per annum, on the south side it was only about half of it. So that the Spanish concession owners were not getting the rain which they needed.

To solve that situation, provision was made under the

Act of 1908 for the building of a public irrigation system, the impounding of the waters of the Jacaguas River for the Guayabal Dam, and in addition to that bringing through by a tunnel from the Toro Negro River on the north side of the ridge water to enable the production and impounding of enough water ordinarily to carry on the irrigation necessary for the south side.

Now, some of the owners on the south side had no concessions, Spanish concessions, at all that they claimed. Others did. The irrigation system that was formed included lands some of which had these concession rights, and some did not. Most of the owners of the concession rights under the Act of 1908, as amended in 1911 and then under the Act of 1913, they had given up their rights; had surrendered them to the government entirely and taken in place of that their rights under the the irrigation district.

But there were other holders of concession rights, including the predecessors of this respondent, who refused to do that; who preferred to stand upon their old rights, and refused to surrender them.

So along in 1913, when the irrigation works were nearly completed—I find from the old records they were actually completed, or substantially so, in March, 1914—in 1913, when they were about to be completed, the situation was presented to the Legislature as to what would be the fair way to solve the situation presented in that way by these holders not being willing to surrender their rights. So at that time this Act of 1913 provided, among other things, in this Section 13 which we read yesterday, that the Commissioner of the Interior was empowered to enter into contracts for the equivalent of the water to be delivered in place of that to which they were entitled under their old concessions. What would be the equivalent in value for the delivery to the lands to which the said water rights or concessions are appurtenant of such equivalent. And the provision is, of course, which shall be delivered to the lands to which the water rights or concessions are appurtenant as the fair

equivalent thereof, with the power to enter into agreements for the relinquishment. Well, these people did not relinquish.

Now, when they came to provide as to the conditions of the delivery—and the language exactly is given—“negotiate with the owner or owners of such water rights or concessions”—

THE CHIEF JUSTICE: Where are you reading from, now?

MR. RIGBY: I am reading from Section 13 of the Act. I am reading from an old brief, from a copy of it. It appears on page—

THE CHIEF JUSTICE: 41?

MR. RIGBY: 41, yes, of my petition in the present case. “empowered to enter into agreements with such owner or owners as to the amount of water and the time, place and conditions of delivery thereof”—would be the fair equivalent.

Now, the Supreme Court of Puerto Rico construes that to mean the conditions; not necessarily the cost of getting it there is to be borne by the Insular Government, but that the conditions of time and place relate to the fact that the old requirements for only so much water can be delivered under each particular old concession to each particular little tract of land; that can be done away with, so that, as in fact was done here, instead of providing that the Fortuna Estates, which had gathered all these little tracts of land into this ownership, rather than continue to take just so much water here for this ten acres and so much water over here for that fifty acres, and so on, could have it delivered at the four places where they wanted it; getting it higher up on the land, in many instances, and being able to use it over the whole tract, which, of course was a tremendous advantage to them and had a good deal to do, in addition to the regularity of delivery, with the value.

MR. JUSTICE REED: How is the amount which the Fortuna is now asked to pay determined,

MR. RIGBY: It is determined under the provisions of Section 2 of this Act No. 49 of 1921, which is here challenged, and which is on page 28, running onto 29, of the appendix to our petition for certiorari.

MR. JUSTICE REED: Is that in substance the proportion of the cost justly attributable to those tracts of land?

MR. RIGBY: Only of the maintenance. Not at all of the cost of constructing the irrigation system.

MR. JUSTICE REED: Only of the maintenance?

MR. RIGBY: Only of the year-to-year maintenance. And it is to be estimated every year by the Commissioner of the Interior based on the experience of the year before on the actual expense; and if the estimate in any one year is too high then it is to be correspondingly cut down for the following year.

MR. JUSTICE REED: Now, do you mean that while a land owner that did not have any water rights has to pay both the cost of construction and maintenance—

MR. RIGBY: Yes.

MR. JUSTICE REED (continuing):—the Fortuna only has to pay the maintenance?

MR. RIGBY: That is right; exactly.

MR. JUSTICE REED: None of the money, however, goes to the support of the Government? It is not taxes?

MR. RIGBY: It is not taxes in any way.

MR. JUSTICE REED: It is just an assessment against this tract of land for the cost of delivering the water to them?

MR. RIGBY: That is precisely what it is. The Insular Government's treasury has no interest in the matter at all, one way or the other, and never has had.

THE CHIEF JUSTICE: Before the passage of this Act—I have forgotten the dates, but this water right was created before the passage of this Act?

MR. RIGBY: You mean, the one under which these people—

THE CHIEF JUSTICE: The water right that was settled by agreement under the statute.

MR. RIGBY: That was in 1914; under the Act of 1913.

THE CHIEF JUSTICE: Now, what about before this Act?

MR. RIGBY: May I go into the history just a minute, then, of this former litigation, because that brings that in?

THE CHIEF JUSTICE: Perhaps I should tell you what is in my mind: I want to see what practical construction, if any, has been given to that.

MR. RIGBY: Yes. The practical construction was—may I say just a word, first: You see, this Act of 1913 contained no provision for any appropriation of money by the Insular Treasury, no provision authorizing the binding of the Insular Treasury to pay any money at all. Apparently what was in the minds of the parties, if they thought about the cost at all—and presumably they must have—was that it would be possible from the sale of surplus water, not bound to the Fortuna Estates by the contract, to raise the money necessary to pay this increased cost of maintenance.

Now, I say that because that is what appears from the Act immediately following.

THE CHIEF JUSTICE: Now, were there any assessments made before 1921?

MR. RIGBY: Well, yes and no. There were not, apparently, so long as the plan of selling the surplus water was carried out under the contract, giving immediate effect—

THE CHIEF JUSTICE: You mean the sale was enough to pay all the expenses?

MR. RIGBY: Definitely, I do not know. Counsel may know, but I never have understood that there was any deficiency at that time. Apparently that was the thing that was the reason for the——

Immediately, almost, after this contract was made and under another Act, also of 1913—which must have been in the minds of the parties when the contract was made, just the same as this Section 13 of this Act—and that is

Act No. 128, Section 33, of the Legislative Assembly of Puerto Rico of 1913. And may I also add that to my brief? I quote to you from the old brief of the former Attorney General, Mr. Howard Kern, in the Veitia litigation back in 1917; and this was right after the contracts were made. The Act read this way:

"That the Commissioner of the Interior under such rules and regulations as may be established by the Executive Council, may sell or lease water controlled by the irrigation service and in excess of the water required by law on the lands in the temporary or permanent irrigation district, for the irrigation of lands either within or without the temporary or permanent irrigation district, or for domestic or other purposes, and the proceeds of such sales or leases shall be applied to the decrease of annual assessments."

Now, under that Act, almost immediately after the 1914 contracts were made, sales were negotiated and contracts made for the sale of surplus water to other parties.

MR. JUSTICE REED: That would seem to be the authority, what you have just read, for assessments against people other than Fortuna.

MR. RIGBY: It would seem to be; I grant that. But apparently they seemed to think they would raise the money in that way. I assume that is what they had in mind, and I am guessing somewhat, because no provision was made in the contracts for the cost of the maintenance.

THE CHIEF JUSTICE: Well, then, assessments were made before 1921?

MR. RIGBY: Well, immediately after these contracts were made, the Fortuna Estates brought an injunction proceeding against the Puerto Rico authorities, claiming that under Section 3 of their contract they were entitled to all the surplus water.

Now, Section 3 appears on page 29 of the record, and it reads:

"Fortuna Estates is hereby granted the right while this agreement remains in force to take in addition to all amounts of water above specified, from the Jacaguas river by pump at the said Aruz Pumping Station, water which may be available there for irrigation of any of its said lands, to the extent that such taking shall not deprive any owners or users of subsisting water rights or concessions upon the Jacaguas river of the water to which such owners or users may be entitled, either by virtue of such water rights or concessions or by virtue of any agreement or agreements in regard thereto entered into or to be entered into by them with The People of Porto Rico; Provided, however, that should The People of Porto Rico at any time undertake the development and utilization of the surplus waters"—Which has never been done.

MR. JUSTICE REED: Now, where is the provision which led the Government of Puerto Rico to think that they had surplus water to sell?

MR. RIGBY: The right to sell anything except the specific amounts given to the Fortuna Estates by Section "First" of this contract. You see, it said so much water shall be given to them. Then it said, in addition, they shall be entitled to any water available, that may be available there for irrigation. But the position of the Puerto Rico Government was that it was not bound to let any water be available there except the amounts they had specifically given by Section "First" of the contract to these people.

MR. JUSTICE REED: They lost on that, the People of Puerto Rico?

MR. RIGBY: They lost on that, but the thing is modified by the fact that three of the five judges of the Circuit Court of Appeals before whom the matter went in the former case were with them on it, and only two were against them. The first time that it went up the Court was composed of Judges Dodge, Bingham and Aldrich. At that time, although it went back on the question of parties, the court expressed its opinion tentatively in favor of the position

of the People of Porto Rico. But when it went back a second time, the composition of the court had changed, and it was then composed of Judges Bingham, Johnson and Anderson. Judge Bingham, and Judge Johnson concurring, held against the People of Porto Rico; Judge Anderson dissenting very vigorously and calling attention to the fact that the decision was contrary to what had been expressed the first time that it was up. Whether Judge Bingham changed his mind, or whether he went along the first time because it was not a final and definite opinion requiring him to finally express his views or decision, we do not know.

MR. JUSTICE REED: The Chief Justice has asked you about assessments prior to 1921, whether that covered assessments for deficiency in operation expenses. Is that covered in the pleading, and does the record show that?

MR. RIGBY: The record, as far as I know, does not show that, and I am not able to definitely answer it. I could look it up.

But, anyway, after this litigation and when it came back in that way as a result of the decision of a divided court and was not brought up here, the People of Puerto Rico were faced with the question of what do do about this question of the maintenance. It seemed to them that the terms of the contract did not bind them to pay anything, and there is no power under the Act of 1913 for the Commissioner to bind the Insular Government to pay anything. But the thing had to be defrayed, and they felt the only way of doing it was to make a kind of special district of the people who were affected in this way, and to tax them pro-rata for what their fair share of it was.

MR. JUSTICE REED: Had there not been an irrigation district created by the Act of 1913?

MR. RIGBY: Of course; and this is wholly outside of that. This is, in effect, just making a kind of addition, as the Circuit Court of Appeals said in the Porto Rico Railway, Light and Power Company case in 18 (2d) [923-924], where

the same thing was done, of the people who should be taxed in this way.

THE CHIEF JUSTICE: They carved it out of the larger district?

MR. RIGBY: They hardly carved it ~~out~~ of the larger district, because these were people not included in the district; they were people outside.

THE CHIEF JUSTICE: What assessments were made?

MR. RIGBY: The assessments were made actually on all of the districts, as they have been ever since.

THE CHIEF JUSTICE: Then some of the lands affected by this program must have been within some kind of a district before 1921?

MR. RIGBY: The lands affected by the program, but not the lands affected by this litigation. Of course, the land—

THE CHIEF JUSTICE: Well, this litigation only affects Russell's lands?

MR. RIGBY: And also—

THE CHIEF JUSTICE: That is what I am trying to get at, that it—

MR. RIGBY: And also the principles of this litigation.

THE CHIEF JUSTICE: Will you get my question, first, please?

MR. RIGBY: Pardon me.

THE CHIEF JUSTICE: Why was it that Russell's land, which is the only land we are concerned with here, primarily, was never assessed before 1921, How was the expense paid, if there were assessments?

MR. RIGBY: Of course, neither Russell's land, nor the land of other owners in the same situation with Russell, who had refused to give up their concessions and had made contracts like this; none of them was assessed for the cost before this Act of 1921. Before 1921 the assessments were made on the lands within the district, in accordance with the provisions of the original act under which the bonds had been issued.

THE CHIEF JUSTICE: Was not Russell within the larger district?

MR. RIGBY: No.

MR. JUSTICE JACKSON: Your taxing law gave to this district the power to tax these people there because of their territorial inclusion within the district; isn't that true?

MR. RIGBY: The general taxing law of the district did not tax these people because they were not in the district.

MR. JUSTICE JACKSON: Yes. So you went outside of the district and selected people who were getting water from within the district?

MR. RIGBY: Precisely.

MR. JUSTICE JACKSON: And levied taxes on their right to get the water?

MR. RIGBY: In effect, made practically a new district out of them.

MR. JUSTICE JACKSON: Well, irrespective of where their lands might be located?

MR. RIGBY: So long as they were within this class.

MR. JUSTICE JACKSON: A class that bore that primary relationship to this irrigation project.

MR. RIGBY: A class that were getting the water; yes, in view of the fact they were not being charged in any way for the cost of getting it to them.

MR. JUSTICE JACKSON: Now, that gets us back to the contract, Exhibit A of the petition, of June, 1915. Was that originally in Spanish or English?

MR. RIGBY: That is in Spanish; that is the contract.*

MR. JUSTICE JACKSON: That is the contract where you say "delivery" means something other than "delivery" would if used in an American-drawn contract or drawn in the United States?

MR. RIGBY: The word "delivery" does not necessarily mean to convey or to constitute a payment. It is to be determined, as the meaning of any word may be, in view of the circumstances under which it was used, as this Court said in the Shell Company case.

* A mistake, they were in English. See letter, February 6, 1942. W. C. R.

MR. JUSTICE JACKSON: If we construe it as we would construe a contract which had the word "delivery" in it as drawn in continental United States, there is not any doubt about this tax being imposed?

MR. RIGBY: If the word "delivery" is to be used as it would be in a deed in the United States, to give a technical conveyance meaning, there would be no question about it.

MR. JUSTICE JACKSON: Then the whole thing depends on whether the use of the word "delivery" in the Puerto Rico contract is modified by some substantial implication. I do not find where that is developed at all in the opinion of the Puerto Rico court:

MR. RIGBY: It is not developed. I simply stated my position on that and I quote what this Court said in the Shell Company case.* Words generally have different shades of meaning and are to be construed as being reasonably based on a standard of use to be arrived at by construing not only the words themselves but as well the context, the operation of the law or contract and the circumstances under which the words were employed. The circumstances here—

MR. JUSTICE JACKSON: I know, but if the standard of use has something to do with this, I don't think it is very well pointed out, either in the opinion of the court or in the brief. I would like to know more about that.

MR. RIGBY: I grant that. But the point, as we see it, is that it was made under those circumstances, and the words are not to be given a technical meaning as the word "delivery" would be in a deed here under the circumstances.

MR. JUSTICE JACKSON: "Delivery" is used repeatedly throughout this contract, and is used that this water is to be delivered and delivered in settlement of the claim these people had because of the irrigation project destroying their water rights which they had, and which the contract seems to recognize as authority.

MR. RIGBY: May I just suggest two things there? In the first place, a reading of the contract will show, I think,

* Puerto Rico vs. Shell Co., 302 U. S. 253, 258.

that their rights were not necessarily destroyed. The contract recites that in spite of the building of the dam the People are still in position to deliver under those contracts. But to facilitate everything they could do—

MR. JUSTICE JACKSON: But this was a settlement between their old water rights and the rights under the contract.

MR. RIGBY: But the fact that they refer to the reservoir above the dam and the building of the dam so they may get delivery, and it is also shown by the fact that these contracts provide for ten days every year, that they are to get deliveries in accordance with their old concessions. They kept that right. So it was subsequently necessary—

MR. JUSTICE JACKSON: It was a settlement between the parties of their prior claims of difference; they were all settled by this contract, were they not?

MR. RIGBY: Yes and no. No; they specially reserved the continued validity of their old concessions, and they reserved the right for ten days every year to get the water under those old concessions. Now, that could not be done unless—

MR. JUSTICE JACKSON: That is settled under this; they were rights reserved under this new agreement. We have to start with the agreement.

MR. RIGBY: Yes; and for ten days every year the agreement says that notwithstanding the other provisions they shall get water under their old concessions. Now that shows, of course, it was subsequently possible to do that and continue to do that. It was simply a matter of what would be the most convenient for everybody.

THE CHIEF JUSTICE: May I interrupt you there?

MR. RIGBY: May I add one other thing? The other major thing, as we view it, is that under the Act of 1913 there was no power whatever given to the Commissioner to bind the government for the payment of any money at all; no appropriation from the treasury, and nothing to authorize

him to bind the government to the payment of the money.

THE CHIEF JUSTICE: What money do you refer to?

MR. RIGBY: Pardon me?

THE CHIEF JUSTICE: What money do you refer to?

MR. RIGBY: The cost of the maintenance of this thing. If you say they are bound to deliver that means they must bear the cost, and—

THE CHIEF JUSTICE: Not what the government was bound to do, but what this beneficiary, this grantee of the water right, was bound to do; whether he is bound to pay anything?

MR. RIGBY: Maybe not, and that is why it was left—

THE CHIEF JUSTICE: But the government was authorized to make provision for getting the water to those claimants. Now, he is getting the water; he is not complaining about that.

MR. RIGBY: He is getting the water.

THE CHIEF JUSTICE: His only complaint is, as you say, there is some order or condition affecting him that he has to pay for it.

MR. RIGBY: Our position is, as we understand the holding of the Insular Supreme Court there was simply nothing said about the cost of maintenance at all. As to that, it is just as though the contract was not there and had never been made. Under the Spanish concessions the right to take the water lies in grants, and the Government has the right to annex to the grants the cost of getting the water to them.

THE CHIEF JUSTICE: Now, will you state succinctly how you think the word "delivery" should be read in this contract?

MR. RIGBY: As though it were an allotment, substantially. It is simply a determination of the quantum of the water.

THE CHIEF JUSTICE: Allotment where? At the source above the dam, or at the station where he was to receive the water?

MR. RIGBY: It is the allotment they are to get. They have a right to take it, not at the place where it was found, and not so much for each little holding, but in quantities at these four large places, the higher placing above.

MR. JUSTICE BLACK: Mr. Rigby, you started to say one thing I did not quite get. Assuming that Russell & Company are held to be relieved of this payment; who has to pay it?

MR. RIGBY: The other holders. That is the only thing to do. The only thing to do would be to pass a statute assessing the other water takers under the older irrigation statute.

MR. JUSTICE ROBERTS: The people who had no such antecedent rights; the people who benefited by this and had no rights before.

MR. RIGBY: They had to pay the cost of the construction of the irrigation system, and these people were not included.

MR. JUSTICE ROBERTS: Certainly.

THE CHIEF JUSTICE: They had acquired their rights by a reduction of the rights of this claimant Russell?

MR. RIGBY: That is hardly fair to say, because their rights were wholly independent of this.

THE CHIEF JUSTICE: They surrendered some rights in order that these other people, who had no rights, could acquire them; isn't that so?

MR. RIGBY: No; I don't think that is fair to say.

THE CHIEF JUSTICE: What was the compensation given them if they were not surrendering rights?

MR. RIGBY: The regularity of getting so much water and getting it at the places that would be much more convenient, instead of having to take it "catch as catch can" and only use it at particular places.

MR. JUSTICE REED: What did Puerto Rico get in return for what she gave to Fortunas?

MR. RIGBY: The convenience, as it is recited, of being able to handle it in this way, and to say that just so much water and no more, as they thought, will have to go.

THE CHIEF JUSTICE: She could not get that convenience without Russell agreeing to something?

MR. RIGBY: She could not get that convenience—it was not a convenience; but it is carefully recited that—

THE CHIEF JUSTICE: So Russell must have surrendered some right in order to permit it?

MR. RIGBY: It is carefully set out and recited in the contract that it is more convenient to do it that way. It does recite, also—

THE CHIEF JUSTICE: Well, if it was more convenient why did not Puerto Rico go ahead and do it without consulting Russell?

MR. RIGBY: They would have had to condemn.

THE CHIEF JUSTICE: And when you condemn you acquire rights, do you not?

MR. RIGBY: Precisely.

THE CHIEF JUSTICE: And, therefore, instead of condemning, they acquired rights under the contract?

MR. RIGBY: Under the contract. And under a contract that apparently counsel in their own brief say, and it has been said all the way through, that having construed a fair equivalent there was no question but what both sides thought they were doing a good thing for themselves in doing this.

THE CHIEF JUSTICE: And the only question is, what is that equivalent?

MR. RIGBY: The question is whether or not the Supreme Court of Puerto Rico is inescapably wrong in saying that the provision for delivery necessarily binds the People of Puerto Rico to pay the cost of getting it there.

MR. JUSTICE FRANKFURTER: And that turns on what Justice Jackson was inquiring about a little while ago; namely, what "delivery" means, doesn't it?

MR. RIGBY: Under all the circumstances.

MR. JUSTICE FRANKFURTER: Now, as I understood you to say, you have very scanty knowledge of the original contract?

MR. RIGBY: That is true, I confess I have not the Spanish of the contract.

MR. JUSTICE FRANKFURTER: The Supreme Court of Puerto Rico did not even advert to the fact that the issue turned on a special meaning in Spanish of the word "delivery"; isn't that right?

MR. RIGBY: The decision rather is on the fact of the lack of power in the Commissioner under the Act of 1913 to bind the government to paying the expenses.

MR. JUSTICE FRANKFURTER: That is a very different problem and that is a very different ground, isn't it?

MR. RIGBY: That is the ground they practically put it on. Perhaps it is.

MR. JUSTICE FRANKFURTER: That is very different from saying "delivery" does not mean the same as here.

MR. RIGBY: I think that "delivery" as used in view of that limitation necessarily was used subject to that limitation, and that "delivery" cannot mean with that limitation what it might mean were that limitation not there.

MR. JUSTICE JACKSON: Then if any part of your argument depends on the difference between the Spanish language and the English language as to "delivery", I would like to find somebody who did go into that text, if that differential is important to your argument.

MR. RIGBY: Well, to that extent, as I say, that it does not show quite as sharp a contradiction of authorities between the lack of power under the Act of 1913 to bind it, and the giving of a contract using the word "delivery" as though it were used in a deed here. So I shall be very glad to, if I may, file the Spanish text.

(Mr. George M. Wolfson thereupon presented oral argument in behalf of the Respondent, Russell & Co., S. en C.)

MR. RIGBY: May I say one word further?

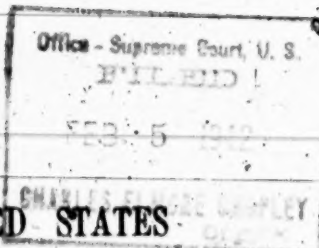
THE CHIEF JUSTICE: Your time has expired, but if you have something you wish to call to our attention.

MR. RIGBY: If I may say just one word more: As to the question of the supposed delegation of legislative power—we put that in Section II of the reply brief filed yesterday in answer to their brief. Now on that point, the meaning of the decision of the Insular Supreme Court, as I understand it, it rests squarely really on the limitation of power under the Act of 1913 to the Commissioner. You see, the Court in 1920, the Circuit Court of Appeals had said, and I think everybody has agreed, that the power of a government official to contract with the owners of water rights was, under this section of the statute, limited to giving in exchange for the old water rights water which would be a fair equivalent in value. And as Judge Anderson quotes in his dissenting opinion from the brief of counsel for the Fortuna Estates, all that the contract of August 26, 1914, was intended to do or did was to change the method and time of delivery for a small part of the concession waters.

THE CHIEF JUSTICE: We will take that on your brief.

(Whereupon, at 1:30 o'clock p. m., the oral argument was concluded.)

FILE COPY



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 95

THE PEOPLE OF PUERTO RICO,

vs.

Petitioner,

RUSSELL & CO., SEN C.,

Respondent.

Respondent has been requested to advise the Court what disposition is made of the moneys collectible under Act No. 49 of 1921 (Appendix to Res. Br. 35).

The moneys are paid to the Treasury and credited to the "Irrigation Fund" (App. Res. Br. 37).

This Fund was created by the 1908 Statute, Sec. 3 (App. Res. Br. 39) and was used to pay for the construction and maintenance of the irrigation system.

The tax on lands which were part of the system took account of such construction cost (Sec. 11—1913 Act, App. Res. Br. 43). Act No. 49 purported to take account only of maintenance costs (App. Res. Br. 36).

In later years the Irrigation Fund was used to defray other expenditures, unrelated to the irrigation system as such (Laws of P. R.—1917, Vol. 2, p. 256; 1921, p. 876; 1925, p. 1024; 1927, p. 512; 1929, p. 212) such as the construction of hydro-electric plants making use of water from the system.

Respondent's lands are not and never were included in the Irrigation System (Complaint Par. V, R. 4; Stipulation Par. 20, R. 80; R. 188 at bottom).

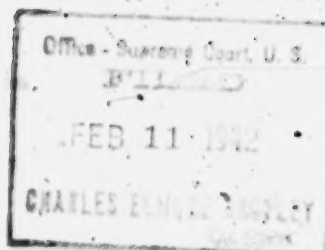
February 4, 1942.

Respectfully submitted,

GEORGE M. WOLFSON,
Attorney for Respondent.

(8673)

FILE COPY



IN THE
Supreme Court of the United States

OCTOBER TERM, 1941

No. 95

February 6, 1942.

RE: NO. 95, THE PEOPLE OF PUERTO RICO

VS.

RUSSELL & CO., S. EN C.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

In response to Mr. Justice Jackson's request to me during the oral argument of this case (second day, Wednesday, February 4th) for the Spanish text of the clause of the contracts of August 26, 1914 relating to "delivery", "make delivery to the Fortuna Estates" of the water allotted them,

"an amount of water which, delivered regularly, may, under all attending circumstances, be considered to be fair equivalent in value for irrigation purposes of the amount of water which the Fortuna Estates would under ordinary circumstances take and use under the said water rights and concessions" (Exhibit A", R. 27, 26),

I sent a radiogram that afternoon to the Attorney General of Puerto Rico, and have received the following reply:

"Relative radiogram No. 43 of February 4 inquiring whether original contracts of August 26, 1914, with Fortuna Estates were written in Spanish or English. Please be advised all indications show that they were executed in English as shown by public deed No. 26 of June 8, 1915, between Commissioner of Interior and Fortuna Estates."

It thus seems possible that the final drafts of the contracts were put into shape in the New York offices of Fortuna Estates, a New York organization as recited in the contracts (R. 23, 24), and sent down to Puerto Rico for execution.

As to the Spanish text of Section 13 of the Act of August 8, 1913, under which the contracts are recited (R. 26) to have been entered into, I am advised, to my surprise, that the Library of Congress does not have a copy of the Spanish text of the Puerto Rican statutes for that year, 1913 [although they do have them for most years]: and accordingly another radiogram is being sent to the insular Attorney General for that text. It will be presented as soon as it comes in.

It appears thoroughly established, however, and not to be disputed, that Section 13 of that statute [whatever the exact Spanish text may have been], limited the power of the insular contracting officials to dealing only with allotments of the water, and nothing else. As JUDGE BINGHAM said in his opinion in the Circuit Court of Appeals, the second time these contracts were there (*People of Porto Rico vs. Russell & Co.*, 268 Fed. 723, 726),—quoted with approval in JUDGE BINGHAM's later opinion, twelve years afterwards, when these contracts were there again, in the earlier phase of the present litigation (*People of Puerto Rico vs. Havemeyer*, 60 F. (2d) 10, 13):

"The power of the government officials to contract with the owners of water rights was, under this section

of the statute, limited to giving in exchange for the old water rights water which would be a fair equivalent in value."

And as JUDGE ANDERSON noted in his dissenting opinion in the 1920 case (268 Fed. at p. 736) counsel for *Russell & Co.* themselves said, in their brief in that case:

"All that the contract of August 26, 1914, was intended to do, or did, was to change the method and time of the delivery of a small part of the concession waters."

It seems perfectly plain on the whole situation that the insular officials (at least) expected to be able to cover whatever additional carrying expense should be entailed in making the water allotted under the contracts available at the designated points, from the right, that they at least thought they were getting under the contract to sell,—under the authority given them by Section 33 of this same Act No. 128 of August 8, 1913 [cited on the oral argument here; *Laws of Puerto Rico, 1913-1914*, pp. 81-82] to:

"sell or lease water controlled by the irrigation service and in excess of the water required by law on the lands in the temporary or permanent irrigation district
..."

That Section 33 was, of course, to be presumed to be just as much in both parties' minds as Section 13. And such sales may have been expected to furnish money enough substantially to cover the added expense of carrying this water to these contractees outside of the Irrigation District.

Accordingly the Commissioner of the Interior proceeded to sell surplus water to other parties. Under one such contract, \$6.00 per day was to be received [Parra contract; *Veitia vs. Fortuna Estates*, 240 Fed. 256, 269]; but Respondent's predecessor, Fortuna Estates, protested and brought an injunction suit, claiming that, under paragraph "Third" of the contracts (R. 29, 45) *their right to take*,

—in addition to receiving the fixed amounts of water allotted to them under paragraph "First" of the contracts, and in those paragraphs recited to be (R. 26, 27; 44), "as specified in this paragraph" in itself the "fair equivalent in value for irrigation purposes" of the amounts which the contractees "would under ordinary circumstances take and use" under their old grants and concessions,—

from the Jacaguas River by pump,

"water which may be available there",

was exclusive, and gave them a positive right to appropriate for themselves *all the water* which might come down into the river at any time in excess of the definite amounts which had been allotted to them by paragraph "First" of the contracts,—and whether such "excess" water came wholly from the watershed of the Jacaguas River or not, and even although a part of it might have come through the contribution to the water behind the dam, derived from the waters brought by the tunnel from the watershed from the Toro River on the north side of the mountain chain.

Of course, if this were correct, there would be no surplus water for the insular officials to sell under Section 33 of the Act of 1913; and hence no money receivable to cover the cost of carrying to the contractees the water allotted to them under paragraph "First" of the contracts.

JUDGE HAMILTON, in the Federal District Court for Puerto Rico, sustained the claim, and granted the injunction. On appeal to the Circuit Court of Appeals he was reversed by that court, then composed of JUDGES DODGE, BINGHAM and ALDRICH. The case went off, however, on a question of jurisdiction, without a definite decision on the merits; but nevertheless JUDGE DODGE, writing the unanimous opinion of the court, strongly intimated that they thought the plaintiff's claim was not sustainable. The opinion said (240 Fed., *supra*, at p. 263):

"It cannot be said that the plaintiff's contract of August 26, 1914, plainly vested in the plaintiff such rights to excess water as it now claims. The terms of the third paragraph, whereon the plaintiff relies, do not, in express terms, grant any right to excess or surplus water. Neither expression is used, and the burden was on the plaintiff to establish the construction for which it contends as the true construction, in view of all the other provisions of the contract and the circumstances therein referred to."

The case went back; DISTRICT JUDGE HAMILTON still adhered to his opinion. On the second appeal the composition of the Circuit Court of Appeals had changed. It had become JUDGES BINGHAM, JOHNSON and ANDERSON. JUDGE BINGHAM apparently changed his mind; and in the opinion written by him and concurred in by JUDGE JOHNSON (but with JUDGE ANDERSON strongly dissenting) plaintiff's claim was sustained, and it was given all the water. JUDGE ANDERSON says (dissenting opinion, 268 Fed. at p. 732, that the prevailing majority opinion

"is inconsistent with the opinion of the court, consisting of JUDGES DODGE, BINGHAM and ALDRICH, when the case was here before";

and that (at pp. 735-736):

"(4) Moreover, the statutory power to contract was limited to 'equivalence in value.' The result reached plainly gives the plaintiffs, not equivalence, but large profits, out of this public irrigation system."

In tabular form the net result of that injunction decree appears to be, substantially:

RESPONDENT'S WATER RIGHTS

BEFORE THE CONTRACTS: UNDER THEIR OLD GRANTS AND CONCESSIONS.

12,612.10 acre feet per year, maximum [11,032.79, plus

1,579.31; for different properties; R. 13, 16]. No minimum. No assurance of receiving any minimum amount whatever. Right to take, for each of many small parcels, limited for each to amount fixed by grant for that particular parcel (tables, R. 39). No right to any water not arising from the watershed of the Jacaguas River itself. Simply a right to "catch as catch can" from such water as might be available in the river, but not exceeding the amounts of the respective separate grants. Subject to all variations of seasons and rainfall. Nothing else.

AFTER AUGUST 26, 1914: UNDER THE CONTRACTS:
[As construed by the majority opinion of the Circuit Court of Appeals in the 1920 decision, 268 Fed. 723, *supra*]:

First. An absolute right to 9,205.45 acre feet [6,258.90 for Fortuna Estates, and 946.55 for Union and Placeres Estates]. To be received regularly, at regular times, every year, regardless of variations in seasons and rainfall. A guaranteed minimum. And

Second. Receivable not only from water from the watershed of the Jacaguas River, but also out of that coming through the tunnel from the Toro River on the north side, thus guaranteeing, in effect, that there would never be a shortage, and that this fixed minimum would always be received; and then, along with that, and in addition,

Third. Whatever further water there might be left in the river [under paragraph "Third" of the contracts, as construed in the 1920 divided court decision of the Circuit Court of Appeals]; and finally,—[besides the "torrential waters", their right to which, as theretofore, remained unchanged],— also

Fourth. The right, ten days in every year, to have the water let down to them, to take from the Jacaguas River, in accordance with their old grants and concessions [Par. "Fifth", R. 30-31; 47-48]. (Thus requiring the insular government always to keep the irrigation system in such shape

that it would be possible for these concessionaires to exercise their rights, under their old concessions.)

Under these contracts, as thus construed by that injunction decree of 1920, *what possible consideration* did the insular government, or the land owners within the irrigation district, receive in exchange for what they were giving up? AS JUDGE ANDERSON said in his dissenting opinion above quoted (268 Fed. *supra*, at pp. 735, 736), it clearly gave the contractees,

“not equivalence, but large profits, out of this public irrigation system.”

It left no means of paying for the cost of carrying to them the water allotted to the contractees. Unless, as JUDGE ANDERSON suggests might become necessary, the land-owners in the irrigation district were to be taxed to pay for it (268 Fed. *supra*, at p. 736), for the benefit of these contractees.

The only other way was to levy an equitable tax, in the nature of a special tax or assessment upon these lands thus receiving these special benefits of these contracts, to defray the actual cost of maintenance and expenses in delivering the water to them.

But now Respondent sets up that the contracts, in addition to giving all of the benefits above listed, were also intended to imply a money obligation,—or else to levy a tax on the water users within the irrigation district,—to find the money to carry this water to these contractees. And that, therefore, this Act of 1921 taxing these specially benefited lands “impairs the obligation of the contracts.”

The insular Supreme Court declined to construe the contracts in any such way. As it says (R. 156; *Petition for Certiorari*, p. 3, footnote 2):

“Indeed even if a clause like that had been included, we apprehend that it would have been void”;

because of lack of authority on the part of the contracting officials to make it under the empowering Act of 1913.

We venture to present with this a printed transcript of the second day's portion of our oral argument; that of Wednesday, February 4th, which includes the copies of the additional statutes cited during the argument, requested to be filed.

Respectfully submitted,

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P. S. Copy being mailed to counsel for Respondent.

FILE COPY

JUL 1

CHARLES ELMER

IN THE
Supreme Court of the United States
OCTOBER TERM, 1940.

No. 1072.

95

THE PEOPLE OF PUERTO RICO,

Petitioner,

v.

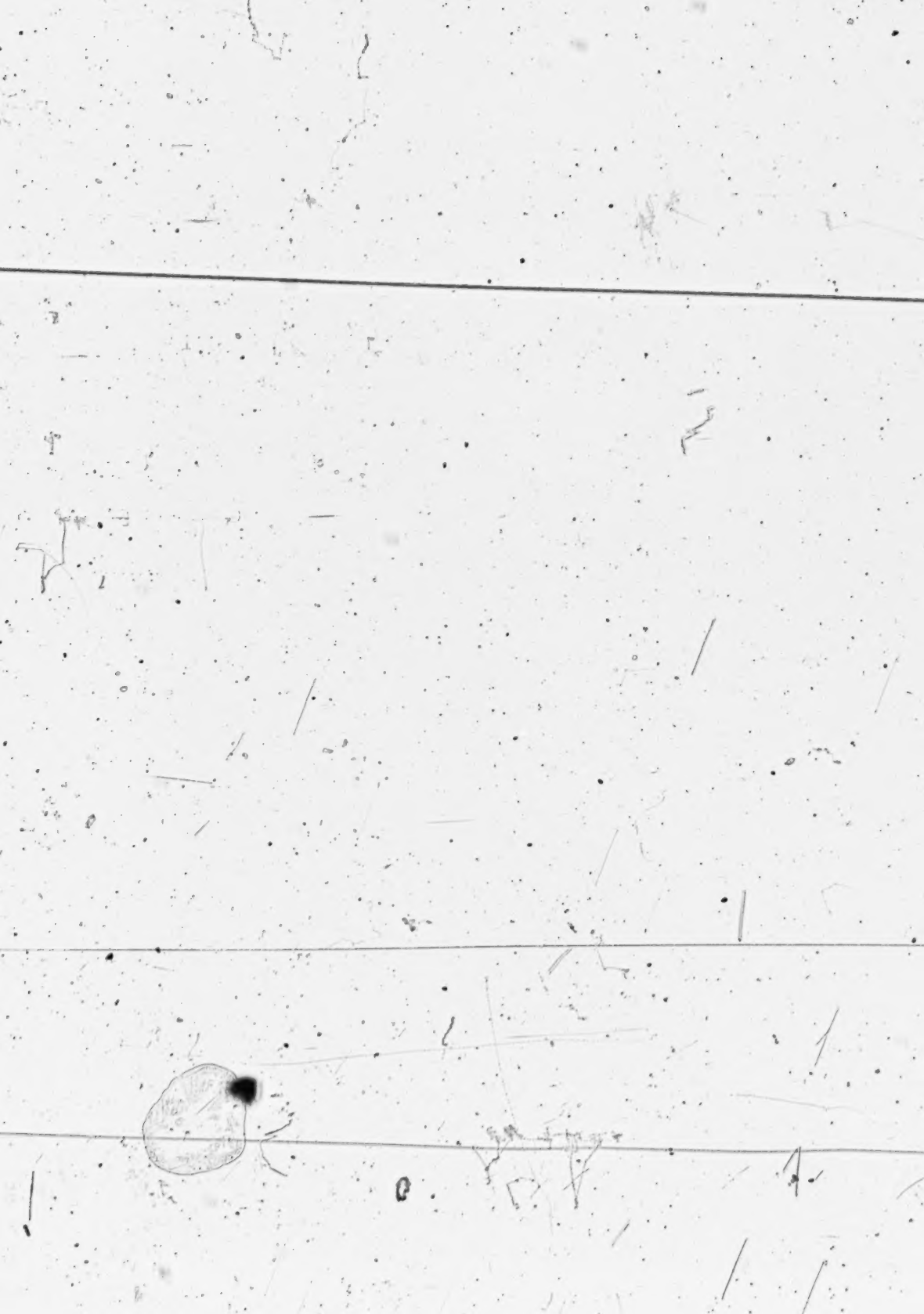
RUSSELL & CO., S. EN C.,

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI.**

✓
GEORGE M. WOLFSON,
Attorney for Respondent.

ROUNDS, MEAD & WOLFSON,
CUTHBERT B. CATON,
Of Counsel.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 1072.

THE PEOPLE OF PUERTO RICO,
Petitioner,

v.

RUSSELL & Co., S. EN C.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion, of the Circuit Court of Appeals appears in 118 F. (2d) 225 (Advance Sheets), and in the Record, page 180.

The opinion of the Supreme Court of Puerto Rico is reported in 56 Decisiones de Puerto Rico (Spanish edition) 343. It has not yet appeared in the English publication of the Puerto Rico Reports, but a translation of the opinion will be found in the Record, page 148.

The opinion of the District Court of San Juan is not officially reported but will be found in the Record, page 54.

Jurisdiction:

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938; Title 28 U. S. C., §347.

Questions Presented.

1. Does Act No. 49 of 1921 (Laws of Puerto Rico 1921, p. 366) impair the obligations of the irrigation contract dated August 26, 1914 between the Acting Commissioner of the Interior of Puerto Rico, as party of the first part, and Fortuna Estates, party of the second part (R. 22, 24 to 38), and the irrigation contract dated August 26, 1914, between said Acting Commissioner, as party of the first part, and José A. Poventud and others, parties of the second part (R. 41 to 53), in contravention of the following provision of the bill of rights contained in the Puerto Organic Act:

“No law impairing the obligation of contracts shall be enacted” (Title 48 U. S. C. §737)?

If this Court reaches the conclusion that the decision of the Circuit Court of Appeals, 118 F. (2d) 225 (R. 180), is correct in holding that said Act No. 49 is invalid as being in violation of said provision of the Organic Act, no further questions will be presented. But if there be doubt as to the correctness of said decision the following additional questions are presented:

2. Is said Act No. 49 invalid in that it delegates to administrative officers the legislative functions of determining the amount of tax to be levied and of levying the

tax, in contravention of Section 25 of the Organic Act (Title 48 U. S. C. §811) vesting all legislative powers in the Puerto Rico legislature?

3. Is said Act No. 49 invalid as being in contravention of the due process provision of the bill of rights in the Organic Act (Title 48 U. S. C. §737) and in violation of the Treaty of Paris, by taking away respondent's water rights under the Spanish concessions owned by respondent, and in further contravention of the due process clause by failing to grant to the taxpayer an opportunity for a hearing before the taxes become fixed?

4. Is said Act No. 49 invalid in that it denies to respondent the equal protection of the laws and further violates the requirement of the Organic Act that the rule of taxation in Puerto Rico shall be uniform (Title 48 U. S. C. §737)?

Statutes.

The provision of the Organic Act upon which the decision of the Circuit Court of Appeals rests reads as follows:

"No law impairing the obligation of contracts shall be enacted" (Title 48 U. S. C. §737).

The other provisions of the Organic Act hereinabove referred to, as well as the complete text of said Act No. 49 of 1921 and applicable portions of other Insular statutes, will be found in the appendix.

Statement of the Case.

Wherever hereinafter used the word "respondent" shall include the predecessors in title of the respondent and of respondent's lessors.

The facts and the rather involved history of this litigation are fully and fairly set forth in the opinion of the Circuit Court of Appeals (R. 180 to 191).

As bearing upon the intention of the petitioner to impose upon respondent, under the guise of taxation, a charge for the waters which under the 1914 contracts petitioner had agreed to deliver as the fair equivalent of the prior rights and concessions of respondent, particular attention is called to the following facts: Following the making of the contracts petitioner attempted to divert from respondent and sell to others the surplus waters which petitioner had agreed by the contracts could be taken by respondent until petitioner should undertake the utilization of such surplus waters (R. 188, 29). Petitioner was finally enjoined by decision of the Circuit Court of Appeals from such diversion of waters (*People of Porto Rico v. Russell & Co.*, 268 Fed. 723; R. 188). The opinion of the Circuit Court of Appeals in that case was filed October 28, 1920. Immediately thereafter and at the next session of the legislature said Act No. 49 (Laws of Puerto Rico 1921, page 366) was passed in an attempt to exact a charge for the waters which petitioner was obligated by contract to furnish, and part of which the court had enjoined petitioner from diverting.

Attention should also be called to the fact that on the trial of this case the petitioner adduced testimony designed to show that benefits were derived by respondent from the regular delivery of water under the contracts (R. 85, 91), although it was admitted that no water in excess of the stipulated amounts was received (R. 84, 92, 93), and that the irrigation system as affected by the existence of the contracts was of great benefit to the People of Puerto Rico (R. 94, 97). It would seem that such testimony is of small, if any, importance. For the purposes of this case we are

prepared to assume that both parties to the contracts relinquished certain rights and derived certain benefits and that the contracts were not unconscionable in leaving either party at the mercy of the other. A nice appraisal of relative benefits under the contracts is unnecessary to the determination of the issues herein. The question is whether the People of Puerto Rico, having entered into the contracts, should be permitted to retain the benefits derived therefrom and at the same time deprive the respondent of its rights by charging it for the water under Act No. 49 of 1921.

We also challenge the statement appearing on page 7 of the petition for certiorari that to permit the decision of the Circuit Court of Appeals to stand would disrupt the entire system of ascertainment, apportionment and assessment of the annual costs of operating and maintaining the Southern Coast Public Irrigation System. Respondent's lands are not within the Irrigation System and are not and never were subject to tax under the 1908 Law, as amended (R. 181, 188; R. 4, par. V of Complaint). The taxes provided in the applicable statutes for the users of water whose lands are included within the irrigation system are not here under attack and are not involved in this litigation (R. 1-6). Those statutes were in force for many years prior to the enactment of Act No. 49. Had respondent's rights and concessions been condemned and appropriate compensation paid therefor, or had they been purchased by petitioner under an arrangement crediting the purchase price against irrigation taxes to be assessed in the future,—either of which alternatives were permitted by existing statutes—it would have been proper to include respondent's lands in the irrigation district and to tax respondent for water used on the same basis as other users in the district (R. 190; Sec. 12, 1908 Irrigation Law, Appendix, p. 23; Sec. 11, 1913 Irri-

gation Law, Appendix, p. 27). But neither alternative was adopted, and in lieu thereof the 1914 contracts were made which, as required by statute, obligated petitioner to furnish to respondent waters amounting to the *fair equivalent* of the waters previously received under their ancient rights and concessions (Laws of P. R. Extr. Sess. 1913, p. 72, Sec. 13, Appendix, pp. 29, 30). ~~Petitioner's charge that the decision of the Circuit Court of Appeals disrupts the scheme of taxation in the irrigation district seems entirely unwarranted by the facts.~~

ARGUMENT.

I.

Act No. 49 of 1921 is invalid in that it impairs the obligations of the contracts of August 26, 1914.

In support of this argument there is little that we can add to the opinion of the Circuit Court of Appeals. As the court states (R. 189, 190; 118 F. (2d) at pp. 230, 231):

"Since the defendants did not wish to relinquish its water rights, and apparently the plaintiff did not wish to condemn and pay for them, they entered into a contract to provide the defendant with the equivalent of its water rights.

.

There is nothing in the contract providing that the defendant pay either for the equivalent in value of water which it had heretofore received free or for delivery of such water. The opposite is implicit in the entire contract.

.

The plaintiff frankly admits that the tax in question is 'very clearly simply a special tax to cover only appellant's fair share of the actual current

maintenance costs of the irrigation works'. That is the entire difficulty. The appellant has no 'fair share' of the maintenance cost of the irrigation works to bear. It was entitled to free water before the passage of the Acts in question. The so-called tax clearly imposes a burden upon the defendant's present right to receive the water agreed to be delivered to it by the plaintiff as a substitute for its old free water rights. We agree with the former opinion of this court in *People of Porto Rico v. Havemeyer, supra*, that this Act undertakes to make the contractual right to receive the water agreed upon conditional on the payment of the taxes in question, and impairs the contractual obligation to furnish the water with no conditions in consideration of the right to build the irrigation system.

The plaintiff had an opportunity to condemn the rights and pay their full value. If after such condemnation, the land was furnished water from the system the defendant would be in the position of one who had never possessed water rights and would be subject to assessments for construction, maintenance and operation. So also if the defendant had relinquished its rights in consideration of inclusion in the district and a credit of the value of the surrendered rights against such assessments. The plaintiff made no such arrangements for payment of value. In effect, it suspended the defendant's rights without compensation and now desires to force it to pay the cost of providing it with water as though it held no rights, in spite of the contractual obligation to provide their equivalent. In such a situation the words of the Supreme Court of the United States in *Woodruff v. Trapnall*, 10 How. 190, 207 (U. S. 1850) seem particularly applicable:

A State can no more impair, by legislation, the obligation of its own contracts, than it can impair the obligation of the contracts of indi-

viduals. We naturally look to the action of a sovereign State, to be characterized by a more scrupulous regard to justice, and a higher morality, than belong to the ordinary transactions of individuals."

See also *Antoni v. Greenhow*, 107 U. S. 769, 795 (1882); *Hall v. Wisconsin*, 103 U. S. 5 (1880); *Green v. Biddle*, 8 Wheat. 1, 92 (U. S. 1832)."

It is submitted that the authorities relied on by the Circuit Court of Appeals amply sustain its decision.

The opinion of the Circuit Court of Appeals on the prior appeal in this case is equally persuasive (62 F. (2d) 10—reversed on jurisdictional grounds 288 U. S. 476).

In *Murray v. Charleston*, 96 U. S. 432, it appeared that the city of Charleston passed an ordinance assessing a general tax on city stock, and by the ordinance the city was allowed to retain as a tax part of the interest due on the stock. The State court held that the ordinance did not impair the obligation of the contract between the city and the holder of the stock, as the possibility of such a tax was in the contemplation of the parties when the plaintiff bought his stock. The Supreme Court of the United States held that the ordinance was void, as it impaired the obligation of the contract between the parties. The Court said at page 444:

"The constitutional provision against impairing contract obligations is a limitation upon the taxing power, as well as upon all legislation, whatever form it may assume."

Continuing, the Court said at page 448:

"There is no more important provision in the Federal Constitution than the one which prohibits

States from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit. The inviolability of contracts, and the duty of performing them, as made, are foundations of all well-ordered society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed."

Another decision presenting features similar to those in the case at bar is *Gulf, &c. Railroad v. Adams*, 90 Miss. 559.

II.

Act No. 49 of 1921 is invalid in that it delegates to administrative officers the legislative functions of determining the amount of tax to be levied and of levying the tax.

The Circuit Court of Appeals on the first appeal in this case, in addition to holding that Act No. 49 impaired the obligations of the 1914 contracts, also held that it was void in that it delegated to the Commissioner of Interior the legislative function of determining the amount to be raised for the ensuing year, such computation being more than mere computation by an administrative official, and involving an exercise of legislative power (62 F. (2d) 10, 16). The Circuit Court of Appeals on the second appeal (from which an appeal to this Court is sought by petitioner) did not address itself to this question, being content to rest its decision on the impairment of the obligations of the 1914 contracts.

Section 25 of the Organic Act (Title 48 U. S. C. §811) vests all legislative power in the Puerto Rico legislature and is similar in wording to Article I, Section 1 of the United States Constitution. The functions of the legislature of Puerto Rico are described in Sections 34 and 37 of the Organic Act (Title 48 U. S. C. §§821-844). The general principles applicable to legislative delegation of power have been recently discussed at length by this Court in *Schechter Poultry Corp. v. United States*, 295 U. S. 495. It would appear to be settled beyond peradventure that the exercise of the taxing power is a legislative and not an administrative function and cannot be delegated to administrative officials.

"The power of taxation, existing exclusively in the legislature, cannot, unless the constitution so provides, be delegated to either of the other departments of the government, or to any individual, private corporation, officer, board, or commission," (61 Corpus Juris 84.)

As stated by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 428:

"The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.

"The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse"

See also:

Rich Hill Coal Company v. Bashore, 344 Pa. 449;

Van Cleve v. Commissioners, 71 N. J. L. 574;

Cooley on Taxation, 4th Ed., Vol. 1, pp. 184, 194,

Vol. 3, p. 2044.

There would seem to be no doubt that the fixing of the tax under Act No. 49 is delegated to administrators. Section 1 of Act No. 49 provides for a special tax in addition to other taxes to be levied upon all parcels of land which receive water from the irrigation system, but do not contribute to the payment of expenses. Section 2 of the Act provides for an estimate by the Commissioner of the Interior of the cost of operating and maintaining the irrigation system and authorizes the Treasurer to fix the total number of acres receiving water from the system. The tax is fixed by dividing the amount estimated by the Commissioner as the cost of operation by the number of acres receiving water as fixed by the Treasurer. Section 2 then goes on to provide that the tax "shall be levied and collected by the Treasurer . . . at the same time as any other tax imposed by the Public Irrigation Law." (See Appendix, p. 19.) Thus the Commission of the Interior and the Treasurer between them fix the total amount of tax to be collected and the amount to be assessed against each taxpayer.

III.

Act No. 49 deprives respondent of its property without due process of law (a) by taking away its water rights under the Spanish concessions, which are protected by the treaty of Paris, and (b) by failing to grant to the taxpayer any opportunity for a hearing before the taxes become fixed.

(a) It would seem clear that respondent's water rights under the Spanish concessions, or their "fair equivalent" provided by the contracts of August 26, 1914, are, in whole or in part, taken away by Act No. 49. That franchises are property is unquestionable.

Gulf, etc., Railroad Company v. Hewes, 183 U. S. 66, 77;

Monongahela Navigation Co. v. United States, 148 U. S. 312, 341;

Wilmington R. R. v. Reid, 13 Wall. 264, 268.

Although the Spanish concessions were suspended while the 1914 contracts remained in force, such suspension was only effected by a contract designed to provide respondent with an "equivalent". (See *People of Porto Rico v. Russell & Co.* 268 F. 723, 729). If that equivalent be removed in the guise of taxation and the concession be not restored, this is tantamount to confiscating the concession. These concessions are protected by the Treaty of Paris which is controlling on the Insular legislature.

Malloy's Compilation of Treaties, etc., Vol. 2, pp. 1690, 1692, 1693—Articles VIII, IX.

As the Attorney General of the United States said in a situation involving water rights in Puerto Rico (22 Op. Atty. Gen. 546, 548):

"If at the time the treaty of Paris took effect the applicant had a completed and vested right to the use of the waters of the River Plata, that right will be respected by the United States."

The provisions of Article VI of the United States Constitution declaring treaties to be the supreme law of the land are binding upon Puerto Rico and neither Puerto Rico nor any states or municipal corporations can interfere therewith.

Bacardi Corp. of America v. Domenech, 311 U. S. 150;

Baker v. Portland, 2 Fed. Cas. No. 777;

Worcester v. Georgia, 6 Pet. 515, 561.

(b) Act No. 49 contains no provision granting respondent an opportunity for a hearing before the taxes become fixed and in that respect further contravenes the due process clause.

Londoner v. Denver, 210 U. S. 373, 385:

" * * * where the legislature of a State * * * commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing."

IV.

Act No. 49 denies to respondent the equal protection of the laws.

It is clear from a reading of the statute that it is aimed especially at those whose rights are protected by contracts, and there is no basis for the attempted classification found in the Act. The mere fact of classification is not sufficient; it must be one based upon some reasonable ground and cannot, as here, be a mere arbitrary selection.

Gulf, Col. & Santa Fe Railway v. Ellis, 165 U. S. 150, 165;

Cotting v. K. C. etc. Co.; 183 U. S. 79, 106.

V.

Act No. 49 violates the requirement of the organic act that the rule of taxation in Puerto Rico shall be uniform.

It is unnecessary to burden the Court with extended citation of authority as to the applicability of the uniformity rule. It is well stated in *Gilman v. City of Sheboygan*, 2 Black 510, 517, as follows: ?

“The uniformity must be coextensive with the territory to which it applies. If a State tax, it must be uniform all over the State. If a county or city tax, it must be uniform throughout the extent of the territory to which it is applicable. But the uniformity in the rule required by the Constitution does not stop here. It must extend to *all property* subject to taxation, so that all property may be taxed alike—equally—which is taxing by uniform rule.”

The tax certainly cannot be sustained as a special assessment for benefits received, and by the very language of the statute, it cannot be construed to be a general property tax upon all lands in Puerto Rico. The tax is expressly confined to lands "which for irrigation purposes are supplied with water from the Southern Coast Public Irrigation System" (Appendix, p. 19). It is indeed a special law designed for the sole purpose of reaching those in the position of respondent who cannot be reached by the valid and effective public irrigation law. As the law cannot be sustained as a general property tax nor as a special assessment for benefits received, it would seem that it fails to meet the test which would require that it be levied uniformly on all taxpayers. The same circumstances which render the act invalid under the equal protection provisions of the Organic Act would seem to deprive it of the necessary uniformity.

VI.

This case does not involve the construction or application of a local law.

Petitioner strives to establish in Point IV of his brief (p. 23) and also in the petition (p. 7) that this case involves a decision of the Insular Supreme Court interpreting and applying an Insular statute, and seeks to obtain the benefit of the rule that a decision of that court will not be reversed in such cases unless it is "patently erroneous" or "inescapably wrong". But we do not see that any question of construction or interpretation or application is here involved. The words of the statute are unambiguous and its purpose and application are clear. The same comment would apply to the 1914 Contracts (R. 24, 41). The only

question before this Court is whether that statute contravenes the fundamental law of Puerto Rico which is contained in the Organic Act. As to such questions it cannot be maintained that the decision of the Insular Court should be deemed final as this would deprive those whose rights are wrongfully invaded by the local legislature of any recourse except an appeal to the local courts. This was not the intention of Congress, and there is no warrant for the contention that the decisions of the local courts on questions of constitutional rights come within the protection of the rule mentioned by petitioner.

VII.

Certiorari herein should not be granted as a matter of course.

Petitioner suggests (Pet., pp. 7, 8) that certiorari might well be granted here as a matter of course, because under somewhat similar circumstances involving a state statute a definite right of review is provided. This argument would seem to defeat itself, because if it had been the intention of the Congress to provide for review as a matter of course of decisions invalidating the statutes of an Insular territory under its Organic Act, it would have been easy for Congress so to provide. In Rule 38 (5) of the Rules of this Court it is stated that a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. There follows an illustrative list of cases in which certiorari will be considered. It does not appear that this case falls within any of the categories mentioned, and we submit that the decision of the Circuit Court of Appeals declaring Act No. 49 invalid is clearly correct.

It is further to be noted that no general system of taxation affecting the revenues of Puerto Rico is here involved, and the litigation would appear not to have any significant or general effect upon the autonomy of the Island, nor upon the operation of the Southern Coast Public Irrigation System (*supra*, p. 5). The statute in question covers a narrow field and imposes a special charge on a limited class, and the proceeds if collected would be used for a special and not a general purpose. Under the circumstances, we do not believe it can be said that the validity or effect of the statute is of great importance to the People of Puerto Rico. On the contrary, this is a case involving a dispute between the Insular government and a private litigant where the statement of this court in *Woodruff v. Trapnall*, 10 How. 190, 207 (*supra*, pp. 7, 8), that the action of a sovereign State should "be characterized by a more scrupulous regard to justice, and a higher morality, than belong to the ordinary transactions of individuals" has a peculiar appropriateness.

Conclusion.

The petition for writ of certiorari should be denied.

June, 1941.

Respectfully submitted,

GEORGE M. WOLFSON,
Attorney for Respondent.

ROUNDS, MEAD & WOLFSON,
CUTHBERT B. CATON,
Of Counsel.

Appendix.

Excerpts from the Organic Act of Porto Rico, Title 48, U. S. Code:

§ 737. *Bill of rights and restrictions.* No law shall be enacted in Porto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws.

No law impairing the obligation of contracts shall be enacted.

Private property shall not be taken or damaged for public use except upon payment of just compensation ascertained in the manner provided by law.

The rule of taxation in Porto Rico shall be uniform.

§ 811. *Legislature; designation of.* All local legislative powers in Porto Rico, except as otherwise provided in this chapter, shall be vested in a legislature which shall consist of two houses, one the senate and the other the house of representatives, and the two houses shall be designated "the Legislature of Porto Rico."

§ 821. *Legislative power.* The legislative authority shall extend to all matters of a legislative character not locally inapplicable, . . .

LAWS OF PORTO RICO—1921, p. 366.

No. 49

AN ACT.

FIXING A TAX ON CERTAIN LANDS USING WATER FROM THE SOUTHERN COAST PUBLIC IRRIGATION SYSTEM, ON WHICH LANDS NO TAX WHATSOEVER WAS LEVIED UNDER THE PUBLIC IRRIGATION LAW, AND FOR OTHER PURPOSES.

Be it Enacted by the Legislature of Porto Rico:

SECTION 1. That a special tax is hereby levied in addition to other taxes already fixed by law, on all parcels of land which for irrigation purposes are supplied with water from the southern coast public irrigation system constructed and in operation pursuant to the provisions of the Public Irrigation Law and amendments thereto, but which under the present Irrigation Law in no way contribute to the payment of expenses for the maintenance of said system.

SECTION 2. That the tax to be levied on each tract of land receiving water from the irrigation system, but which under the law in force does not contribute towards defraying the cost of such system, shall be classified as follows: The Treasurer of Porto Rico shall have charge of fixing the total number of acres receiving water from the irrigation system which includes: (1) tracts of lands subject to taxation pursuant to the provisions of the public irrigation law and amendments thereto, for the purpose of reimbursing the cost of the irrigation works; (2) tracts of land to which the Irrigation Commission acknowledged the right to the use of water or to which such right was acknowledged by the courts in cases of appeal, as rights acquired under the law for the use of water under prior concessions; (3) tracts of land irrigated with water delivered in accordance with acquired rights or concessions which have not been assigned, which said water, pursuant to the terms of the contracts entered into with the Commissioner of the

Interior or because of decisions of the Irrigation Commission, is delivered in whole or in part and is measured at the canals of the Irrigation Service system, and such tracts shall be determined by dividing the value of the said concessions in acre feet per year, as the same may be or shall have been fixed by the Commissioner of the Interior, by the Irrigation Commission or by decision of the courts, by four, that is to say, by the number of acre-feet per year established by the Public Irrigation Law as a normal rate for delivery per acre for the formation of the irrigation district; (4) parcels of land irrigated by water supplied because of acquired rights or concessions which have not been assigned, which said water, pursuant to the terms of the contracts entered into with the Commissioner of the Interior or under decisions of the Irrigation Commission, is taken and measured in the rivers at the points of intake indicated in the said concessions; and such tracts shall be determined by dividing the value of the said concessions in acre-feet per year, as the same may be or as shall have been fixed by the Commissioner of the Interior, by the Irrigation Commission or by decision of the courts in cases of appeal, by five. The Treasurer of Porto Rico shall then take amount estimated or certified to as estimated by the Commissioner of the Interior for defraying the cost of operations and maintenance of the irrigation system during the following fiscal year (as provided under Section 11 of Act 128, approved August 8, 1913, which amends the Irrigation Law approved September 18, 1908), and shall add thereto or subtract therefrom, as the case may be, any resulting deficit between or surplus over, the amount expended and certified to as expended by the Commissioner of the Interior for expenses of operation and maintenance of the irrigation system during the preceding fiscal year, and the amount estimated or certified to as estimated by the Commissioner of the Interior for defraying the cost of operation and maintenance of the irrigation system during the aforesaid preceding fiscal year. The Treasurer shall then divide the amount so determined by the total number of acres computed as hereinbefore provided, and

the result shall be and shall constitute the tax per acre which shall be levied during said subsequent fiscal year on all tracts supplied with water from the southern coast public irrigation system, and which in no other manner are subject to the payment of a tax to meet the cost of the said irrigation system.

This tax shall be levied and collected by the Treasurer of Porto Rico at the same time as any other tax imposed by the Public Irrigation Law, and the moneys collected shall be covered into the Insular Treasury to the credit of a special trust fund known as the "Irrigation Fund," to be invested in the same manner and for the same purposes provided by the Public Irrigation Law and laws amendatory thereof.

SECTION 3. All laws or parts of laws in conflict herewith are hereby repealed.

SECTION 4. This Act shall take effect ninety days after its approval.

Approved, July 8, 1921.

Extracts from the Irrigation Law of Porto Rico (Laws of Porto Rico, Special Session, 1908, pages 44 to 70.)

AN ACT

TO PROVIDE FOR THE CONSTRUCTION OF AN IRRIGATION SYSTEM, AND TO PROVIDE REVENUES THEREFOR; FOR THE TEMPORARY APPROPRIATION OF TWO HUNDRED THOUSAND DOLLARS TO BEGIN SUCH WORK; AND FOR OTHER PURPOSES.

Be it Enacted by the Legislative Assembly of Porto Rico:

Section 1.—The sum of two hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any moneys in the Treasury not otherwise appropriated, for the purpose of carrying to completion the preparation of working plans and specifications for the construction of an irrigation system for the district situated approximately between the river Patillas on the east and the river Portugues on the west, and irrigable lands on both sides of both rivers and for the commencement and prosecution of the work of construction thereof, and expenses in connection therewith, until such time as sufficient funds shall be available in the Treasury from the sale of the bonds provided for such purpose by legislative enactment.

Section 3.—The proceeds of the sale of the bonds and all moneys accruing by reason of assessments of taxes and sales of water and power within the irrigation district shall, subject to the provisions of Section 29 of this Act, be deposited in the Treasury of Porto Rico, in a trust fund to be known as the "Irrigation Fund", which fund may be subdivided for statistical purposes as the Auditor may prescribe. All expenditures for the construction and maintenance of the irrigation system, and all payments of interest and principal of any debt incurred for the construction

of the said system, shall be payable from the said trust fund upon warrant of the Auditor countersigned by the Governor.

.

Section 11.—Should it at any time appear that there is a surplus of water over and above the amount necessary to irrigate all the lands of the irrigation District, the Commissioner of the Interior shall proceed to sell such surplus water, on public calls for bids upon terms to be approved by the Executive Council, the proceeds of such sale to be covered into the Irrigation Fund.

Section 12.—The irrigation engineer herein provided, his officers, agents, or employees, shall have the right to enter, after notifying the owner or his representative, upon any lands to make surveys and to locate and establish any of the works contemplated or embraced in said irrigation system, including the lines of any canal, road, tunnel, reservoir site, aqueduct, power station, transmission lines or other requisite, but indemnity shall be paid to the owner for such damages as he may incur in consequence of said works. The Commissioner of the Interior shall have power, when necessary, to initiate suits for condemnation in the name of The People of Porto Rico for the acquisition of any land or right embraced within the approved plans of the said irrigation project, and for the purpose of such condemnation proceeding all land and water rights, all rights of way for the transmission of water and electric currents, all sites for reservoirs, canals, roads, tunnels, aqueducts, ditches, power stations, and other things embraced in and contemplated by said irrigation plan so approved, are hereby declared to be works of public utility, and as such are hereby declared subject to the power of eminent domain and open to expropriation proceedings in the manner provided by law. *Provided, however,* that all said rights and things, together with any existing and outstanding water rights not theretofore surrendered to The People of Porto Rico may be made subject of condemnation proceedings without com-

pliance with those provisions of law requiring a declaration of public utility by the Executive Council pursuant to the Act approved March 12, 1908, entitled "An Act to amend an act entitled 'An Act to provide for the condemnation of private property for the purposes and under the conditions therein named', approved March 12, 1903," or any other provisions relating to declarations of public utility *and provided; further* that the Executive Council shall at all times have authority to acquire for said irrigation system such rights and things wherever possible, by settlement out of court to avoid condemnation proceedings.

• • • • •

Extracts from the 1913 Amendments to the Irrigation Law of Porto Rico (Laws of Porto Rico, Extraordinary Session, 1913, pages 54 to 84.)

AN ACT

TO AMEND CERTAIN SECTIONS OF THE PUBLIC IRRIGATION LAW, APPROVED SEPTEMBER 18, 1908, AS AMENDED;

TO AMEND CERTAIN OTHER LAWS RELATING TO THE IRRIGATION SYSTEM, AND THE ISSUE OF BONDS THEREFOR;

TO PROVIDE FOR THE FORMATION OF A TEMPORARY AND A PERMANENT IRRIGATION DISTRICT;

TO PROVIDE THE NECESSARY ADDITIONAL FUNDS FOR THE COMPLETION OF THE IRRIGATION SYSTEM, AND FOR MEETING THE OBLIGATIONS OF THE OUTSTANDING IRRIGATION BONDS, AND FOR THE OPERATION AND MAINTENANCE OF THE IRRIGATION SYSTEM UNTIL THE COMPLETION OF THE SAME, OR UNTIL SUFFICIENT FUNDS MAY BE RAISED THEREFOR FROM THE ASSESSMENTS UPON THE IRRIGABLE LANDS WHICH SHALL BE INCLUDED IN THE TEMPORARY OR IN THE PERMANENT IRRIGATION DISTRICTS HEREIN PROVIDED FOR, OR FROM OTHER REVENUES DERIVED FROM THE SAID IRRIGATION SYSTEM; AND FOR OTHER PURPOSES.

Be it enacted by the Legislative Assembly of Porto Rico:

SECTION 2.—That the said Irrigation Commission shall have the power, and are hereby directed, to fix, according to the provisions hereinafter contained, the geographical boundaries of both a temporary and a permanent irrigation district; to determine what irrigable land shall be included therein; and to determine, as hereinafter provided, the value of water rights or concessions, and the basis for the computation of credits to be given on account thereof, on the taxes to be assessed as hereinafter provided upon the lands to which the said water rights or concessions are appurtenant.

SECTION 7.—During the existence of the temporary irrigation district the Irrigation Commission shall have the power and is hereby directed to fix the boundaries of a permanent irrigation district, and to determine what irrigable lands are to be included therein. For the purpose of determining the said permanent irrigation district, the Irrigation Commission shall examine critically each tract or local subdivision which might be included in the said permanent irrigation district, examining not only the lands which were included in the temporary irrigation district, but also any lands not included in the said temporary irrigation district, but which, in their judgment, might be included in the said permanent irrigation district, with a view to determining what lands are so located and of such a nature that they can be profitably and successfully irrigated under the Public Irrigation Law, as amended, and as herein provided. It shall give due consideration to all water rights or concessions heretofore granted, also, as far as practicable, to the results and effects of the operation of the irrigation system during the existence of the temporary irrigation district, and shall include in the said permanent irrigation district such lands, and only such lands, as in the judgment of the Irrigation Commission are so located and of such a nature that they will receive by forming a part of the permanent irrigation district a benefit greater in amount than the total cost or burden imposed by law upon the said lands, as hereinafter provided.

.

The said Irrigation Commission shall determine as to each water right or concession which is appurtenant to any tract of land, and which has been relinquished or transferred to The People of Porto Rico, and which shall not already have been valued by agreement reached between a representative or representatives of The People of Porto Rico and the owner or owners of the land to which the said water right or concession is appurtenant, its fair equivalent in value, stated in aere feet, per annum, reasonably distributed throughout the year; *Provided, however, That*

in no case shall the equivalent allowed for any such water right or concession be greater than the amount of water granted by, and beneficially used under, the said water right or concession as originally granted or as legally construed or limited.

The said Irrigation Commission shall then determine the basis for the computation of credits to be given on account of each relinquished water right or concession appurtenant to land included in the permanent irrigation district, upon the taxes assessed upon the said land, complying in all respects with the provisions of the contract, if any, for the relinquishment of the said water right or concession, and giving due consideration, in determining the basis for the said computation, to the conditions of the said contract of relinquishment and the extent to which the said water right or concession has, in effect, been relinquished. The Irrigation Commission shall compile a report of their findings as to the above basis for the computation of credits on taxation, stating in each case the percentage which the said credit shall bear to the total taxation which, but for such credit, would fall upon the lands to which the said water rights or concessions are appurtenant.

.

Section 11.—The amount that shall be assessed and levied upon a given tract of land included in the permanent irrigation district shall be determined as follows:

The Treasurer of Porto Rico shall calculate the amount of the interest and principal or sinking fund due upon outstanding irrigation bonds for the ensuing fiscal year and shall add thereto the total amount due upon credits for the ensuing year on account of water rights or concessions; and shall further add thereto the amount estimated and certified as estimated to him by the Commissioner of the Interior for the cost of operation and maintenance of the irrigation system for the said ensuing fiscal year. He shall then either add to or subtract from the amount so obtained the estimated amount of any deficit or surplus, as the case may be, existing in connection with the Irrigation Fund from the

operations of the current fiscal year. From this amount he shall subtract the amount estimated and certified as estimated to him by the Commissioner of the Interior as the receipts for the ensuing fiscal year from any water power developed in connection with the irrigation system (until such time as the total bonded indebtedness incurred on account of the irrigation system shall have been paid in full); and the amount estimated and certified as estimated to him by the Commissioner of the Interior as receipts for the ensuing fiscal year from any other sources except from the issues of bonds and from special assessments herein provided for to be levied upon the land in the permanent irrigation district. To the amount so determined the Treasurer shall add an amount equivalent to two per centum of the total as a margin of safety for delayed collections, and the amount thus determined by the Treasurer of Porto Rico, subject to the limitations and provisions hereinafter set forth, shall be and constitute the total sum assessed for the said fiscal year, and the same shall be levied upon the lands at the time included in the permanent irrigation district (including any lands owned by The People of Porto Rico which form part of the said district, which lands shall be liable for and pay taxes levied hereunder in the same manner as the other lands included in the said irrigation district);

The amount of credit on taxes to which any tract of land having a water right or concession shall be entitled on account of the relinquishment of the same shall be such percentage of such taxes as shall have been determined by the Irrigation Commission as hereinbefore provided.

No tract of land included in the permanent irrigation district shall pay any tax until it shall have received or have been offered water from the irrigation system for a period of twelve months (said water to have been received after the inclusion of the said land in the temporary irrigation district, or, if the said land is first included in the permanent irrigation district, after the said inclusion); but

thereafter the said tract of land shall be liable at the regular assessment dates to the same assessments as would have been the case had all the lands in the permanent irrigation district been assessed under the provisions of this section; *Provided*, That the said tract of land shall pay a tax for the portion of the half year (either fiscal or calendar, as the case may be), if any, remaining after the completion of the said period of twelve months, for which no taxes are paid in accordance with the foregoing provisions, and the tax due for any such portion of a half year shall be payable upon the first of the month succeeding the completion of the said period of twelve months for which no taxes are paid in accordance with the foregoing provisions.

Assessments under the foregoing provisions shall be made upon each particular tract of land in the proportion that the area of such tract of land bears to the whole number of acres included in the said permanent irrigation district.

SECTION 13.—In the case of any land carrying a water right or concession of which the source of supply is destroyed or impaired by the construction or operation of the irrigation system, which shall not have been relinquished or surrendered to The People of Porto Rico, such land shall be entitled to receive from the irrigation system an amount of water which is the reasonable equivalent in value of the said water right or concession.

The Commissioner of the Interior is hereby authorized to negotiate with the owner or owners of such water rights or concessions, and with the owner or owners of any water rights or concessions heretofore relinquished or surrendered on condition that the lands to which they are appurtenant should form part of the irrigation district, and which lands have not been included by the Irrigation Commission, and the said Commissioner of the Interior shall be empowered to enter into agreements with such owner or owners as to the amount of water and the time, place and conditions of delivery thereof, which shall be delivered to the

lands to which the said water rights or concessions are appurtenant as the fair equivalent in value thereof, with the power on behalf of the Irrigation Service to enter into agreement with such owner or owners for the relinquishment to The People of Porto Rico of such water rights or concessions, and for the delivery to the lands to which the said water rights or concessions are appurtenant of such fair equivalent. Before entering into any such agreement, the Commissioner of the Interior shall consult the Attorney General of Porto Rico as to the validity and legal status of the water rights or concessions involved.

In the case of any water right or concession in connection with which no such contract or agreement is made prior to January 1, 1914, the Irrigation Commission shall have the power to decide as to the validity and the legal status of any such water right or concession, and in the case of valid and subsisting water rights or concessions to determine what amount of water must be delivered by the Irrigation Service to the lands to which such water rights or concessions are appurtenant.

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JAN 29 1942

CHARLES ELMORE CRUMLEY

IN THE

Supreme Court of the United States

OCTOBER TERM 1941.

No. 95.

THE PEOPLE OF PUERTO RICO,

Petitioner.

v.

RUSSELL & CO., S. EN C.,

Respondent.

BRIEF FOR RESPONDENT.

GEORGE M. WOLFSON,

Attorney for Respondent.

ROUNDS, MEAD & WOLFSON,

CUTHBERT B. CATON,

Of Counsel.

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No. 95.

THE PEOPLE OF PUERTO RICO,
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RUSSELL & Co., S. EN C.,
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BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the Circuit Court of Appeals is reported in 118 F. (2d) 225 (R. 180).

The opinion of the Supreme Court of Puerto Rico is reported in 56 Decisiones de Puerto Rico (Spanish edition) 343. A translation of the opinion will be found in the Record, page 148.

The opinion of the District Court of San Juan is not officially reported but will be found in the Record, page 54.

Jurisdiction.

The case is here on writ of certiorari to the Circuit Court of Appeals for the First Circuit. Jurisdiction rests on Section 240 (a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938; Title 28 U. S. C., §347.

Questions Presented.

1. Does Act No. 49 of 1921 (Laws of Puerto Rico 1921, p. 366) imposing a tax upon waters supplied to respondent from the Jacaguas River in Puerto Rico impair the obligations of the irrigation contract dated August 26, 1914 between the Acting Commissioner of the Interior of Puerto Rico, as party of the first part, and Fortuna Estates, party of the second part (R. 22, 24 to 38, 76), and the irrigation contract dated August 26, 1914, between said Acting Commissioner, as party of the first part, and José A. Poventud and others, parties of the second part (R. 41 to 53, 79), in contravention of the following provision of the bill of rights contained in the Puerto Organic Act:

"No law impairing the obligation of contracts shall be enacted" (Title 48 U. S. C. §737)?

If this Court reaches the conclusion that the decision of the Circuit Court of Appeals, 118 F. (2d) 225 (R. 180), is correct in holding that said Act No. 49 is invalid as being in violation of said provision of the Organic Act, no further questions will be presented. But if there be doubt as to the correctness of said decision the following additional questions are presented:

2. Is said Act No. 49 invalid in that it delegates to administrative officers the legislative functions of determining the amount of tax to be levied and of levying the tax, in contravention of Section 25 of the Organic Act (Title 48 U. S. C. §811) vesting all legislative powers in the Puerto Rico legislature?

3. Is said Act No. 49 invalid as being in contravention of the due process provision of the bill of rights in the

Organic Act (Title 48 U. S. C. §737) and in violation of the Treaty of Paris, by taking away respondent's water rights under the Spanish concessions owned by respondent?

4. Does said Act No. 49 further contravene the due process clause by failing to grant to the taxpayer an opportunity for a hearing before the taxes become fixed?

5. Is said Act No. 49 invalid in that it denies to respondent the equal protection of the laws and further violates the requirement of the Organic Act that the rule of taxation in Puerto Rico shall be uniform (Title 48 U. S. C. §737)?

Statutes.

The provisions of the Organic Act hereinabove referred to, as well as the complete text of said Act No. 49 of 1921 and applicable portions of other Insular statutes, will be found in the appendix.

Statement of the Case.

This appeal is from a judgment of the Circuit Court of Appeals for the First Circuit entered March 10, 1941 reversing a judgment of the Supreme Court of Puerto Rico and remanding the case to that court with direction to order the complaint dismissed. The case arose in the District Court of Puerto Rico for the District of San Juan and was a suit to recover taxes with surcharges alleged to be due under an act of the legislature of Puerto Rico known as Act No. 49 of 1921, approved July 8, 1921 entitled "An Act Fixing a Tax on Certain Lands using Water from the Southern Coast Public Irrigation System, on which lands

no Tax Whatsoever was Levied under the Public Irrigation Law, and for Other Purposes," (Laws of Porto Rico, 1921, p. 336). The case was tried before said District Court without a jury upon a stipulation of facts and certain additional evidence offered by the plaintiff (R. 57, 73, 82, *et seq.*) and resulted in a judgment overruling the amended complaint (R. 65). This judgment was reversed by the Supreme Court of Puerto Rico on March 15, 1940, and respondent was directed to pay to the petitioner \$61,617.04 with interest from and after June 24, 1930, plus the sum of \$36,051.84 with interest from June 8, 1934 (R. 169).

The Facts.

The case is fully stated in the opinion of the court below (R. 180, *et seq.*), but we think it may be helpful to review here the salient facts. The word "respondent" as used herein shall include the predecessors in title of respondent as to part of the land involved in this litigation and the respondent's lessors and the predecessors in title of such lessors as to other portions of the land involved in this litigation.

By virtue of ancient concessions and royal decrees of the Spanish Crown and of certain users and prescriptions, respondent for many years has been the owner of water rights entitling it to take water, both ordinary flow and torrential, from the Jacaguas River which flows into the Caribbean Sea on the southerly side of Puerto Rico (R. 74, 77). These rights permitted respondent to take water through intakes constructed by it in the aggregate amount of 12,612.1 acre-feet per year (R. 74, 77), in addition to torrential water without limit as to quantity except as limited by the size and location of the torrential intakes (R. 75,

78). An acre-foot of water is the amount required to cover one acre to a depth of one foot (Funk & Wagnalls New Standard Dictionary, 1937).

The People of Puerto Rico undertook the construction of a public irrigation system on the south side of Puerto Rico. Such project necessitated the erection of a dam for the impounding and storage of part of the waters of the Jacaguas River, and this resulted in the building of the Guayabal Dam extending across the bed of the river above respondent's intakes (R. 75). Some method had to be found whereby the rights of riparian owners below the dam could be acquired or suitably protected, and pursuant to the provisions of the Public Irrigation Law as from time to time amended, this could be accomplished by one of three methods:

1. The People of Puerto Rico could condemn existing water rights and pay the owners the fair value thereof in cash (Laws of P. R., Sp. Sess. 1908, Sec. 12, App., p. 39). This was not done.

2. The owners could relinquish their concessions, have them valued as provided in the Irrigation Law and be paid the amount thereof by receiving credits upon their proportionate share of the expense of the construction and operation of the system (Laws of P. R., Extr. Sess. 1913, Secs. 2, 7, 11, App., pp. 41, 42, 43). This was not done.

3. With respect to the owners whose rights were not condemned or relinquished as above set forth but whose source of supply was impaired or destroyed by the construction or operation of the irrigation system, Section 13 of the Act of 1913 (Laws of P. R., Extr. Sess., 1913, App., p. 45) provides:

"In the case of any land carrying a water right or concession of which the source of supply is destroyed or impaired by the construction or operation of the irrigation system, which shall not have been relinquished or surrendered to The People of Porto Rico, such land shall be entitled to receive from the irrigation system an amount of water which is the reasonable equivalent in value of the said water right or concession."

The statute then empowers the Commissioner to negotiate with the owners of such water rights or concessions and to enter into contracts with them as to the amount of water to be delivered *as the fair equivalent* in value of such rights and concessions and as to the time, place and conditions of delivery thereof (App., pp. 45, 46). This was the method adopted with respect to respondent.

Under date of August 26, 1914 two contracts, substantially identical in all important particulars, were entered into by the Insular Government with the predecessors in title of respondent and of respondent's lessors. The contracts are attached to the complaint and set forth in full in the record as Exhibits A and B (R. 24, 76; 41, 79). The preambles of the contracts recite the ownership of the land abutting on the Jacaguas River, the claims of respondent to the water concessions, the construction of the irrigation system which might impair those claims, the fact that the water rights and concessions were not relinquished or surrendered (under plans Nos. 1 or 2, *supra*), and that the amount of water taken by respondent for irrigation varied from month to month in accordance with rainfall so that it was impossible to determine in advance the exact amount of water to which respondent was entitled for a fixed period of time. The preambles further declared the readiness of

the Insular Government to deliver to respondent the amount of water to which the latter was entitled under its concessions, but in order to facilitate and make more certain the operation of the dam and the irrigation system of which it was a part, it was stated to be the desire of the Government to determine and agree upon an amount of water which, delivered regularly, would be considered the fair equivalent in value for irrigation purposes of the amounts which respondent would ordinarily take and use under its rights and concessions. The preambles then recited the authority of the Commissioner of the Interior, under the above quoted Section 13 of the amendment to the Public Irrigation Law of August 8, 1913, after consultation with the Attorney General of Puerto Rico as to the validity and legal status of the water rights and concessions of respondent, to enter into the agreement for delivery to respondent of an amount of water equivalent to the water taken and used under its rights and concessions and as to the time, place and conditions of delivery thereof (R. 24 to 27; 41 to 44).

There followed elaborate and carefully worked out provisions for the delivery of water by the Insular Government to respondent. In brief summary, the contracts provided for delivery of 8,258.98 acre-feet of water per year under one contract (R. 27) and 946.55 acre-feet per year under the other contract (R. 45) making a total of 9,205.53 acre-feet per year. Thus respondent accepted in lieu of its right to 12,612.1 acre-feet per year under the concessions a reduction of substantially 27% in the amount of water to be taken from the river, other than torrential water. The contracts further provided for the manner of delivery of such water at intakes located on the respective estates and they provided for delivery in regular daily amounts

(R. 27, 28, 45). Further provision was made for the taking of surplus waters within certain limits, for the taking of waters derived through underground filtration or seepage from behind the dam, and for the protection of respondent's right to take torrential waters from the river (R. 29, 30, 46, 47). Further provision was made that respondent should exercise its old concessions during ten days in each year to prevent their being destroyed by non-use (R. 30, 47). The contracts protected the claims of respondent to the ancient rights and provided for the exercise thereof if the operation of the irrigation system should be suspended or discontinued (R. 33, 34, 50, 51). The other detailed provisions of the contracts do not seem to require summary here.

The Public Irrigation Law as it existed at the time of the making of these contracts provided for the assessment upon lands in the irrigation district of a uniform amount per acre to defray the cost of construction, maintenance and operation of the system and embraced within its provisions those persons who had no water rights as well as those whose rights had been condemned or relinquished (App., pp. 43-45). But no attempt was made to tax owners of water rights entering into contracts such as those involved in this case.

Shortly after the making of the contracts a controversy arose between the Government and respondent with regard to surplus waters in the river, the Government claiming the right to sell such waters and respondent denying that right under the contracts. After somewhat extended litigation the controversy was finally resolved in favor of respondent on October 28, 1920 by a decision of the Circuit Court of Appeals for the First Circuit in *People of Porto Rico v. Russell & Co.*, 268 Fed. 723. By this decision the Government was restrained from diverting from re-

spondent the surplus waters to which it was entitled under the contracts. The validity of the contracts was sustained and it was held that the ancient concessions of respondents were suspended during the existence of the contracts. (268 Fed. at p. 729).

There the matter stood for about eight months. At the next session of the legislature of Puerto Rico there was enacted Act No. 49 of 1921 (Laws of P. R., 1921, p. 366; approved July 8, 1921), the avowed purpose of which was to compel those in the position of respondent to pay, in the guise of a special tax, for the water received by way of exchange under the contracts. This is shown by the title of the Act: "An Act Fixing a Tax on Certain Lands using Water from the Southern Coast Public Irrigation System, on which lands no Tax Whatsoever was Levied under the Public Irrigation Law, and for Other Purposes", and by the first section of the act which reads as follows:

"That a special tax is hereby levied in addition to other taxes already fixed by law, on all parcels of land which for irrigation purposes are supplied with water from the southern coast public irrigation system constructed and in operation pursuant to the provisions of the Public Irrigation Law and amendments thereto, but which under the present Irrigation Law in no way contribute to the payment of expenses for the maintenance of said system."

(The act is set forth in full in the appendix (p. 35). The second section of the act sets out the manner in which the taxes should be computed. After directing the Treasurer to ascertain or to fix the total number of acres receiving water from the irrigation system, including lands covered by contracts such as exist in the case at bar, he was required to take the amount estimated by the Commissioner of the

Interior as necessary to defray the cost of operating and maintaining the system for the following year and to add thereto or subtract therefrom any deficit or surplus certified by the Commissioner of the Interior as remaining after the payment of expenses for operating and maintaining the system during the preceding year. The amount so determined was to be divided by the total number of acres computed as above stated and the result constituted the tax per acre on all tracts supplied with water from the irrigation system which in no other manner are subject to the payment of a tax to meet the cost thereof.

The law was obviously aimed solely at those in the position of this respondent.

In the course of the trial it appeared that respondent during the operation of the contracts has received certain benefits because of the regular delivery of water (R. 85, 91, 92) but has not received any water in excess of the amount stipulated (R. 84, 92, 93). It was also admitted by petitioner and its counsel that the irrigation system as affected by the existence of the contracts was of great benefit to the People of Puerto Rico (R. 94, 97).

History of This Litigation.

In a suit brought by respondent in 1924 in the District Court of the United States for Puerto Rico, the Government was enjoined in June, 1926, from attempting to collect any tax under Act No. 49 (R. 81). The Government appealed, but while the appeal was pending, Congress passed the Act of March 4, 1927 (44 Statutes at Large, 1421) amending Section 48 of the Organic Act by inserting therein the provision:

"That no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico."

Following the decision of the Supreme Court in *Smallwood v. Gallardo*, 275 U. S. 56, holding that tax injunction cases pending at the time of the passage of the Act of March 4, 1927 abated, the Circuit Court of Appeals for the First Circuit remanded the case to the District Court with directions to dismiss the suit for want of jurisdiction (*Gallardo v. Havemeyer*, 21 F. (2d) 1012).

On April 23, 1928 Congress passed an Act for the relief of taxpayers whose suits had been dismissed by reason of the decision in *Smallwood v. Gallardo*, *supra* (45 Statutes at Large, 447), and said statute provided that in cases pending March 4, 1927 where the taxpayer had obtained an injunction prior to such date restraining the assessment or collection of a Puerto Rico tax, after trial on the merits in the District Court of the United States, the enforcement of any such tax should thereafter be "by a suit at law instead of by attachment, embargo, distraint, or any other form of summary administrative proceeding".

As a result of the passage of this Act, the People of Puerto Rico instituted this action.

The action was originally brought in the Insular District Court for the Judicial District of San Juan and was removed to the District Court of the United States for Puerto Rico on the ground of diversity of citizenship. After a trial on the merits the said United States District Court held that said Act No. 49 was invalid on the ground that it impaired the obligations assumed by the Government of Puerto Rico under the aforesaid contracts, and on the other grounds mentioned in our Summary of Argument.

(*infra*, p. 13; see Record on prior appeal to this Court, October Term 1932, No. 492, pp. 68, 69).—Pursuant thereto judgment was entered on December 21, 1931 dismissing the complaint.

On appeal the Circuit Court of Appeals for the First Circuit affirmed the judgment of the District Court upon the ground that the case had been properly removed to the federal court, that Act No. 49 impairs the obligation of the contracts of August 26, 1914 and that it was void for the further reason that it delegated to administrative officers the legislative function of levying taxes (*People of Porto Rico v. Havemeyer*, 60 F. (2d) 10).

The case thereafter came to this Court on certiorari, and it was held that this respondent for purposes of jurisdiction of the federal court should be regarded as a legal entity with its domicile in Puerto Rico and that the suit had been improperly removed to the federal court (*People of Porto Rico v. Russell & Co., et al.*, 288 U. S. 476). The Court did not consider any of the constitutional questions involved in this appeal but remanded the case with instructions that it be further remanded to the Insular Court from which it was removed.

As the result of the last mentioned decision the case was remanded to the Insular Court. The complaint was amended to include taxes and surcharges under Act No. 49 for the period subsequent to the filing of the original complaint and a trial followed in the Insular District Court. Said District Court followed the opinion in *People of Porto Rico v. Havemeyer*, 60 F. (2d) 10, *supra*, and dismissed the complaint on the ground that the said Act was unconstitutional (R. 54, 65). On appeal the Supreme Court of Puerto Rico refused to follow the said decision of the Circuit Court of Appeals and rendered judgment for the Government,

holding that Act No. 49 did not violate any of the provisions of the Organic Act (R. 148 *et seq.*). It was on appeal from the last mentioned decision that the Circuit Court of Appeals rendered the judgment which is under review in the case at bar.

The Court below held that Act No. 49 is invalid in that it impairs the obligations of the 1914 contracts (R. 180). The other constitutional questions were not passed upon (R. 191).

Summary of Argument.

I. Act No. 49 of 1921 impairs the obligations of the contracts of August 26, 1914 in that it deprives respondent of the benefits thereof by subjecting respondent to heavy charges in the guise of taxation. The Act was expressly designed for this purpose. The constitutional prohibition against impairment of obligations of contract contained in the Organic Act applies as well to a contract to which the sovereign is a party as to any other type of contract.

II. Act No. 49 of 1921 clearly delegates to administrative officers the legislative function of fixing the rate of taxation by determining the amount of money to be raised for each year to defray the expenses of maintenance and operation, and allocating such expense among the taxpayers concerned. It thus violates the provisions of the Organic Act fixing the function of the Puerto Rico Legislature. These provisions do not differ materially from relative provisions in other constitutions.

III. Act No. 49 of 1921 deprives respondent of property without due process of law by burdening with special

taxation its ancient concessions and prescriptive rights, suspended during the operation of the contracts. Such concessions and rights were recognized and preserved by the Treaty of Paris between the United States and Spain. The concessions and rights were supposedly replaced in the contracts by a "fair equivalent". By burdening such fair equivalent, the statute in effect burdens the concessions and ancient rights.

IV. The Act further is defective under the due process clause of the Organic Act, because it does not provide the taxpayer with an opportunity for hearing and protest before the tax becomes fixed.

V. The Act is further in violation of the Organic Act in that the discriminatory character of the tax imposed and the arbitrary and unreasonable classification of taxpayers deprives respondent of the equal protection of the law. It further violates the rule that taxation shall be uniform by imposing a punitive tax upon land of a limited class in the guise of a so-called special assessment for improvements.

VI. The case does not involve the construction or application of a local law. Neither the statute nor the 1914 contracts are ambiguous and no question of construction or interpretation or application is involved. The only question before the Court is the validity of the statute under the Organic Act.

ARGUMENT.

I.

Act No. 49 of 1921 is invalid in that it impairs the obligations of the contracts of August 26, 1914.

Section 2 of the Organic Act of Puerto Rico, 39 Stat. 951; 48 U. S. C. Sec. 737, contains the provision:

“No law impairing the obligations of contracts shall be enacted.”

The whole scheme of the group of statutes under which the irrigation system was established and maintained contemplated that in the case of those whose water rights were acquired either by condemnation or relinquishment the former owners of such rights should be placed in the same position as those who never had possessed such rights. This was, of course, equitable because presumably upon the condemnation or relinquishment of their rights they received an equivalent in cash or in credits (see Statement of Facts, p. 5). The statutes, however, furnished no method of protecting those whose rights were not condemned or relinquished, except by furnishing them with a *fair equivalent* pursuant to contract. The carefully drawn recitals of the 1914 contracts and the elaborate provisions for the delivery of water under various circumstances and contingencies all bear out the idea that the contracts were intended to furnish to respondent such *fair equivalent*.

Although respondent accepted under the contracts a smaller amount of water in acre-feet than the 12,612.1 acre-feet to which it was entitled under the concessions, it is to be assumed, as indicated in the contracts, that the regularity and certainty of delivery would make up for the loss

in volume. The testimony (R. 84, 92 to 94, 97) as to the benefits derived by each of the contracting parties from the operation of the contracts would seem to be of small if any importance. For purposes of this appeal we are prepared to assume that each party to the contracts knowingly and willingly relinquished certain rights and in return derived certain benefits, and there is no evidence to indicate that the contracts were unconscionable in leaving either party at the mercy of the other. A nice appraisal of relative benefits under the contracts would not seem to be necessary to the determination of the issues herein.

There can be no doubt as to the correctness of our contention that Act No. 49 is aimed at respondent and those in the position of respondent. The very title of the Act and the wording of Section 1 thereof (App., p. 35), show this. Under Section 2 of the Act (App., p. 36), the Treasurer is directed to take into account four classes of lands. The first two classes are those subject to taxation under other provisions of the Irrigation Law either because the owners had no water rights or their water rights had been acquired by the Government. Classes 3 and 4 dealing with contracting owners of rights are the classes taxed under the Act. Respondent is in Class 4. The testimony of petitioner's witness Chapel (R. 101, 104) and the form of communication from the Treasurer to taxpayers (see figures, R. 136) show that this was the manner in which the Act was administered. The acreage shown in the example on page 136 of the Record is not actual acreage but "equivalent" acres based on the amount of water furnished. The testimony of the Government witnesses Chapel and Luchetti (R. 100, 101, 102) bears out the conclusion that Act No. 49 does not and was not designed to levy a tax upon real property, *but imposes a charge for water furnished.*

The time of the enactment of this statute lends further corroboration to our contention that its purpose was solely to deprive respondent of the benefits derived under the contracts without restoring to respondent its ancient concessions and rights, for the law was not enacted until the irrigation system had been in operation for a considerable period of time. It was not part of the scheme of taxation worked out in the group of statutes enacted between 1908 and 1913. Act No. 49 was enacted only after the Circuit Court of Appeals had made its decision in 1920 in *People of Porto Rico v. Russell & Co.* 268 Fed. 723, restraining the Government from appropriating surplus waters which under the contracts belonged to respondent. The first attempt at violation of the contracts having failed, a new effort was immediately made at the next session of the Legislature, when Act No. 49 was enacted.

It is submitted that respondent's rights under the contracts are clear, and that the purpose and effect of Act No. 49 are clear. There remains only the question whether the Act can be sustained under the provisions of the Organic Act.

On two occasions the Circuit Court of Appeals has decided that the Act impairs the obligations of the 1914 contracts, 60 F. (2d) 10; 118 F. (2d) 225. We cannot improve upon the cogent argument contained in the opinion of the court below from which we quote as follows (R. 190):

"The plaintiff had an opportunity to condemn the rights and pay their full value. If after such condemnation, the land was furnished water from the system the defendant would be in the position of one who had never possessed water rights and would be subject to assessments for construction, maintenance and operation. So also if the defend-

ant had relinquished its rights in consideration of inclusion in the district and a credit of the value of the surrendered rights against such assessments. The plaintiff made no such arrangements for payment of value. In effect, it suspended the defendant's rights without compensation and now desires to force it to pay the cost of providing it with water as though it held no rights, in spite of the contractual obligation to provide their equivalent. In such a situation the words of the Supreme Court of the United States in *Woodruff v. Trapnall*, 10 How. 190, 207 (U. S. 1850) seem particularly applicable:

'A State can no more impair, by legislation, the obligation of its own contracts, than it can impair the obligation of the contracts of individuals. We naturally look to the action of a sovereign State, to be characterized by a more scrupulous regard to justice, and a higher morality, than belong to the ordinary transactions of individuals.'

See also *Antoni v. Greenhow*, 107 U. S. 769, 795 (1882); *Hall v. Wisconsin*, 103 U. S. 5 (1880); *Green v. Biddle*, 8 Wheat. 1, 92 (U. S. 1832)'' (R. 190).

It is submitted that the authorities relied on by the Circuit Court of Appeals amply sustained its decision.

We further submit that the court below unanswerably disposes of petitioner's contention that there was no showing that the water rights or the contractual equivalent thereof were to be permanently tax free. The court states as follows:

'The plaintiff insists, however, that the tax is valid since there is no showing that the water rights or the contractual equivalent thereof were to be permanently tax free. We need not here decide whether a general property tax or other tax might validly be

imposed on the defendant's right to take water from the Jacaguas River for irrigation purposes. Suffice it to say that this is not such a tax. This is a special assessment to cover the actual current maintenance costs of the irrigation works. It is based upon a benefit which is not conferred and is in violation of a contract to provide an equivalent of free water. It is well settled that under the guise of levying taxes, a state may not impair the obligation of contracts. *Murray v. Charleston*, 96 U. S. 432 (1877) (R. 190).

In *Murray v. Charleston*, 96 U. S. 432, it appeared that the City of Charleston passed an ordinance assessing a general tax on city stock, and by the ordinance the city was allowed to retain as a tax part of the interest due on the stock. The State court held that the ordinance did not impair the obligation of the contract between the city and the holder of the stock, as the possibility of such a tax was in the contemplation of the parties when the plaintiff bought his stock. The Supreme Court held that the ordinance was void, as it impaired the obligation of the contract between the parties. The Court said at page 444:

"The constitutional provision against impairing contract obligations is a limitation upon the taxing power, as well as upon all legislation, whatever form it may assume."

Continuing, the Court said at page 448:

"There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit. The inviolability of

contracts, and the duty of performing them, as made, are foundations of all well-ordered society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed."

See also:

Woodruff v. Trapnall, 10 Howard 190;
Fletcher v. Peck, 6 Cranch 87;
Green v. Biddell, 8 Wheaton 1, 92;
Hall v. Wisconsin, 103 U. S. 5;
Antoni v. Greenhow, 107 U. S. 769, 775;
Cooley on Taxation, Vol. I, 4th Ed., Section 136,
 page 318.

In *Wood v. Lovett*, 313 U. S. 362 (May 26, 1941) the Court was called upon to consider the contract clause of the Federal Constitution as applied to a sovereign state. It appeared that the Arkansas legislature enacted a statute in 1935 protecting from attack because of various irregularities the title of those purchasing tax-forfeited property from the State of Arkansas. The act was repealed in 1937, but in the interim the Commissioner of State Lands had conveyed certain properties to appellant. It further appeared that in the sale of said properties to the State in 1933 for non-payment of taxes there were certain irregularities which, but for the 1935 act, would have rendered the sale void. Notwithstanding that the Arkansas law provided for the reimbursement to the appellant of the amount paid by him for the purchase price, subsequent taxes and improvements,—a circumstance not paralleled in the case at bar,—the Court held that the 1935 statute, together with appellant's deed, constituted a contract by the State with

the appellant, which was impaired by the 1937 statute. The Court states, page 369:

“Under the settled rule of decision in this court, the execution of the State’s deeds to the appellants constituted the execution or consummation of a contract, the rights arising from which are protected from impairment by Article I, § 10 of the Constitution; and the obligation of the State arising out of such a grant is as much protected by Article I, § 10, as that of an agreement by an individual. *Fletcher v. Peck*, 6 Cranch 87, 136, 137, 139. The Act of 1935, taken in connection with the other statutes regulating the acquirement by the State, and the disposition by it, of lands sold for delinquent taxes, constituted, in effect, an offer by the State to those who might become purchasers of such lands, and the protection it afforded to the title acquired by such purchasers necessarily inured to every purchaser acting under it and constituted a contract with him.

The federal and state courts have held, with practical unanimity, that any substantial alteration by subsequent legislation of the rights of a purchaser at tax sale, accruing to him under laws in force at the time of his purchase, is void as impairing the obligation of contract (citing numerous cases).”

It does not seem necessary to multiply citations in support of the familiar rule that sovereign governments are as much bound by the obligation of contracts clause of the Constitution as private individuals (*Woodruff v. Trapnall*, 10 How. 190; *Indiana ex rel. Anderson v. Brand, Trustee*, 303 U. S. 95; *Mississippi ex rel. Robertson v. Miller*, 276 U. S. 174).

A case similar in many particulars to the one at bar is *Gulf &c. Railroad v. Adams*, 90 Miss. 559, which involved a State statute levying a privilege tax on railroads which

under their charters were exempt from State supervision as to rates within certain maximum and minimum limits.

This statute was held unconstitutional by the Supreme Court of Mississippi, which said at page 605:

“There are several things to be noted which we think demonstrate the unconstitutionality of this act in this respect beyond controversy. First. This additional privilege tax is an extraordinary tax, one over and beyond the usual privilege tax required to be paid by other railroads doing similar business in this state. Second. It is clear that the imposition of this privilege tax is an exaction made solely because of the enjoyment by the appellant of this contract privilege in its charter. It was not for the legislature to extend by the charter contract the privilege of regulating its rates within certain limits to this appellant with one hand, and then with the other, after the road had been built, practically take away the privilege by the imposition of this privilege tax. * * * Fourth. This \$10 per mile additional privilege tax is a burden imposed on the corporation as a condition to its further exercise of the corporate right conferred by its charter. * * * We are constrained to declare that this legislation * * * violates both the contract clause of the constitution of the United States and the fourteenth amendment thereof.”

II.

Act No. 49 of 1921 is invalid in that it delegates to administrative officers the legislative functions of determining the amount of tax to be levied and of levying the tax.

Section 25 of the Organic Act (39 Stat. 958; 48 U. S. Code Section 811), reads as follows:

“All local legislative powers in Porto Rico, except as otherwise provided in this chapter, shall be vested in a legislature which shall consist of two houses, one the senate and the other the house of representatives, and the two houses shall be designated ‘the Legislature of Porto Rico’ ”.

This provision is quite similar to Article I, Section 1 of the United States Constitution, which provides that,

“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.”

The functions of the Legislature of Puerto Rico are described in Sections 34 and 37 of the Organic Act (48 U. S. C., Secs. 821-844). Its authority extends to all matters of a legislative character not locally inapplicable (App., p. 34).

It is submitted that Act No. 49 wholly delegates the duties of the Legislature to the Treasurer of Puerto Rico and the Commissioner of the Interior. This is more than a mere delegation of the duty of making computations to determine the amount of a tax of which the rate or amount is fixed by the Legislature. The entire amount to be raised by the tax depends upon the Commissioner of the

Interior's estimates of the cost of operation and maintenance of the irrigation system, weighted or lightened by the addition or subtraction of a previous deficit or surplus, and allocated among the taxpayers according to an additional determination to be made by the Treasurer. On the first appeal to the Circuit Court of Appeals in this case, 60 F. (2d) 10, the Court stated as follows:

"Counsel for the plaintiff, however, contend that the determination of the *amount to be raised* for an ensuing year is a pure matter of computation, and that the act has pointed out how that computation shall be made. But this clearly is not so, for the amount to be raised is, by the terms of the act, to be estimated by the Commissioner of the Interior, and as this estimate involves the exercise of legislative power, it could not be delegated to the commissioner" (p. 16).

In the important recent decision of this Court, *Schechter Poultry Corp. v. United States*, 295 U. S. 495, appears the following statement (pp. 529-530) by Mr. Chief Justice Hughes:

"The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Art. I, §1. And the Congress is authorized 'To make all laws which shall be necessary and proper for carrying into execution' its general powers. Art. I, §8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly. . . . But we said that the constant recognition of the necessity

and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."

See also the concurring opinion of Mr. Justice Cardozo, p. 551, *et seq.*

It would seem to be well established that the exercise of the taxing power is a legislative and not an administrative function and that it therefore cannot be delegated to administrative officials. As stated by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 428:

"The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.

"The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse * * *."

In *Rich Hill Coal Company v. Bashore*, 334 Pa. 449; 7 Atl. (2d) 302, decided in 1939, the Pennsylvania Supreme Court held invalid a provision of the Pennsylvania Workmen's Compensation and Rehabilitation Act which empowered the State Department of Labor and Industry to assess a charge on all employers in the State to pay for the cost of administering the Act, the Department determining the amount of each assessment. The Court found that this was,

in effect, a tax, and held that the Act illegally delegated legislative power. We quote as follows (p. 498):

"In any event, if the assessments are upon employers regardless of their participation in the system, the section in reality provides for a tax * * * but it would be a tax levied in varying amounts at the discretion of the department. The legislature cannot delegate its power to tax to such a commission. *Wilson et ux v. Phila. School Dist. et al.*, 328 Pa. 225; *Van Cleve v. Passaic Valley Sewerage Comrs.*, 71 N. J. L. 574; *People of Porto Rico v. Havemeyer*, 60 F. (2d) 10."

Van Cleve v. Passaic Valley Sewerage Commissioners, 71 N. J. Law, 574, is a case very much in point. It appeared that to defray the cost of a sewerage system the amount to be raised by the taxing statute was committed solely to sewerage commissioners within maximum limits as to the matter of construction and without any limit in the matter of maintenance. The New Jersey Court of Errors and Appeals held this to be a wrongful delegation of legislative function and stated (p. 581):

"Every system of taxation consists of two parts—the elements that enter into the imposition of the tax, and the steps taken for its assessment and collection. The former is a legislative function conserved by constitutional prescriptions; the other is mere machinery. The latter may be delegated to other than governmental agencies; not so the former. Matters of computation, appraisement, adjustment, and such like, involving mere certainty of detail, follow the delegable power. * * * But no element that enters essentially into the tax itself may be so delegated."

The general rule is well stated in *Corpus Juris*, Vol. 61, p. 84:

"The power of taxation, existing exclusively in the legislature, cannot, unless the constitution so provides, be delegated to either of the other departments of the government, or to any individual, private corporation, officer, board, or commission, although duties in reference to taxation which are merely advisory or ministerial in their nature, such as computing the levy, may be delegated. . . . nor can it authorize subordinate governmental agencies to exercise the power of taxation, without definitely fixing the rates of the levy or amount to be collected."

III.

Act No. 49 is invalid as depriving the respondent of its property without due process of law by taking away its water rights—or the equivalent furnished by the 1914 contracts—under the Spanish concessions which are preserved by the Treaty of Paris.

Section 2 of the Organic Act provides in part as follows:

"*Bill of rights and restrictions.* No law shall be enacted in Porto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws.

"Private property shall not be taken or damaged for public use except upon payment of just compensation ascertained in the manner provided by law."

We submit that respondent's water rights under the Spanish concessions, or their "fair equivalent" provided by the contracts of August 26, 1914, are, in whole or in

part, taken away by Act No. 49. That franchises are property is unquestionable.

Gulf, etc., Railroad Company v. Hewes, 183 U. S. 66, 77;

Monongahela Navigation Co. v. United States,
148 U. S. 312, 341;

Wilmington R. R. v. Reid, 13 Wall. 264, 268.

Although the Spanish concessions were suspended while the 1914 contracts remained in force, such suspension was only effected by a contract designed to provide respondent with an "equivalent". (See *People of Porto Rico v. Russell & Co.* 268 F. 723, 729). If that equivalent be removed or burdened in the guise of taxation and the concession be not restored, this is tantamount to confiscating the concession.

These concessions are recognized and preserved by the Treaty of Paris which is controlling on the Insular legislature.

Malloy's Compilation of Treaties, etc., Vol. 2,
pp. 1690, 1692, 1693—Articles VIII, IX (App.,
p. 34).

As the Attorney General of the United States said in a situation involving water rights in Puerto Rico (22 Op. Atty. Gen. 546, 548):

"If at the time the treaty of Paris took effect the applicant had a completed and vested right to the use of the waters of the River Plata, that right will be respected by the United States."

The provisions of Article VI of the United States Constitution declaring treaties to be the supreme law of the land are binding upon Puerto Rico, and neither Puerto

Rico nor any states or municipal corporations can interfere therewith.

Bacardi Corp. of America v. Domenech, 311 U. S. 150;

Baker v. Portland, 2 Fed. Cas. No. 777;

Worcester v. Georgia, 6 Pet. 515, 561.

IV.

Act No. 49 further violates the due process clause of the Organic Act by failing to grant to the taxpayer an opportunity for a hearing before the taxes become fixed.

The persons subject to taxation or assessment under Act No. 49 are given no right or opportunity for a hearing before the taxes become fixed. It is submitted that in this respect the Act further contravenes the due process clause of the Organic Act (App., p. 34).

Londoner v. Denver, 210 U. S. 373, 385:

"* * * where the legislature of a State * * * commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing."

See also;

Turner v. Wade, 254 U. S. 64;

Coe v. Armour Fertilizer Works, 237 U. S. 413, 425;

Security Trust Co. v. Lexington, 203 U. S. 323.

The only provision in Act No. 49 regarding levy and collection of the tax appears in the last paragraph of Section 2, as follows:

"This tax shall be levied and collected by the Treasurer of Porto Rico at the same time as any other tax imposed by the Public Irrigation Law" (App. p. 37)

The quoted provision provides merely for the time of levy and collection.

V.

Act No. 49 denies to respondent the equal protection of the laws and further violates the requirement of the Organic Act that the rule of taxation in Puerto Rico shall be uniform.

The Organic Act of Porto Rico contains the following provisions:

"§737. *Bill of rights and restrictions.* No law shall be enacted in Porto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws."

"The rule of taxation in Porto Rico shall be uniform."

It is clear from a reading of Act No. 49 that it is aimed especially at those whose rights are protected by contracts, and there is no basis for such an attempted classification. The mere fact of classification is not sufficient; it must be one based upon some reasonable ground and cannot, as here, be a mere arbitrary selection.

Gulf, Col. & Santa Fe Railway v. Ellis, 165 U. S. 150, 165;

Cotting v. K. C. etc. Co., 183 U. S. 79, 106.

The rule as to uniformity is well stated in *Gilman v. City of Sheboygan*, 2 Black 510, 517, as follows:

"The uniformity must be coextensive with the territory to which it applies. If a State tax, it must be uniform all over the State. If a county or city tax, it must be uniform throughout the extent of the territory to which it is applicable. But the uniformity in the rule required by the Constitution does not stop here. It must extend to *all property* subject to taxation, so that all property may be taxed alike—equally—which is taxing by uniform rule."

The tax certainly cannot be sustained as a special assessment for benefits received, and by the very language of the statute, it cannot be construed to be a general property tax upon all lands in Puerto Rico. The tax is expressly confined to lands "which for irrigation purposes are supplied with water from the Southern Coast Public Irrigation System", and which are not otherwise taxable under the Irrigation Law (App., pp. 35, 36). It is indeed a special law designed for the sole purpose of reaching those in the position of respondent. As the court below stated (R. 190):

"This is a special assessment to cover the actual current maintenance costs of the irrigation works. It is based on a benefit *which is not conferred* . . ."
(Italics ours.)

As the law cannot be sustained as a general property tax nor as a special assessment for benefits received, it would seem that it fails to meet the test which would require that it be levied uniformly on all taxpayers.

The same circumstances which render the act invalid under the equal protection provisions of the Organic Act would seem to deprive it of the necessary uniformity.

VI.

The case does not involve the construction or application of a local law.

Petitioner strives to establish in Point IV of his brief (p. 23) and also in the petition (p. 7) that this case involves a decision of the Insular Supreme Court interpreting and applying an Insular statute, and seeks to obtain the benefit of the rule that a decision of that court will not be reversed in such cases unless it is "patently erroneous" or "inescapably wrong". Respondent submits that the decision of the Supreme Court of Puerto Rico is clearly erroneous. Nevertheless we do not see that any question of construction or interpretation or application is here involved. The words of the statute are unambiguous and its purpose and application are clear. Nor is there any ambiguity in the meaning of the 1914 contracts (R. 24, 41). The only question before this Court is whether Act No. 49 contravenes the fundamental law of Puerto Rico, contained in the Organic Act. As to such questions it cannot be maintained that the decision of the Insular Court should be deemed final as this would deprive those whose rights are wrongfully invaded by the local legislature of any recourse except an appeal to the local courts. This was not the intention of Congress, and there is no warrant for the contention that the decisions of the local courts on questions of constitutional rights come within the protection of the rule mentioned by petitioner.

Conclusion.

The judgment appealed from should be affirmed in all respects.

All of the circumstances in this case indicate that the People of Puerto Rico has not dealt in good faith with respondent in respect of its contractual rights. It seems apparent that the Government has deliberately attempted to deprive respondent both of its ancient rights and concessions, temporarily suspended by the contracts, and of the benefits accruing to respondent from the contracts themselves. As stated in *Woodruff v. Trapnall*, 10 How. 190, 207 (*supra*, pp. 20, 21):

"A State can no more impair, by legislation, the obligation of its own contracts, than it can impair the obligation of the contracts of individuals. *We naturally look to the action of a sovereign State, to be characterized by a more scrupulous regard to justice and a higher morality, than belong to the ordinary transactions of individuals.*" (Italics ours.)

January, 1942.

Respectfully submitted,

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ROUNDS, MEAD & WOLFSON,
CUTHBERT B. CATON,
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Appendix.

Excerpts from the Organic Act of Porto Rico, Title 48, U. S. Code:

§ 737. *Bill of rights and restrictions.* No law shall be enacted in Porto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws.

No law impairing the obligation of contracts shall be enacted.

Private property shall not be taken or damaged for public use except upon payment of just compensation ascertained in the manner provided by law.

The rule of taxation in Porto Rico shall be uniform.

§ 811. *Legislature; designation of.* All local legislative powers in Porto Rico, except as otherwise provided in this chapter, shall be vested in a legislature which shall consist of two houses, one the senate and the other the house of representatives, and the two houses shall be designated "the Legislature of Porto Rico."

§ 821. *Legislative power.* The legislative authority shall extend to all matters of a legislative character not locally inapplicable.

Excerpts from Treaty of Paris December 10, 1898 (Malloy's Compilation of Treaties, etc., Volume 2, pp. 1692, 1693):

Article VIII.

In conformity with the provisions of Articles I, II and III of this treaty, Spain relinquishes in Cuba, and cedes in

Porto Rico and other islands of the West Indies, in the island of Guam, and in the Philippine Archipelago, all the buildings, wharves, barracks, forts, structures, public highways and other immovable property which, in conformity with law, belong to the public domain, and as such belong to the Crown of Spain.

And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, cannot in any respect impair the property rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be.

Article IX.

The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.

LAWS OF PORTO RICO—1921, p. 366.

No. 49

AN ACT.

FIXING A TAX ON CERTAIN LANDS USING WATER FROM THE SOUTHERN COAST PUBLIC IRRIGATION SYSTEM, ON WHICH LANDS NO TAX WHATSOEVER WAS LEVIED UNDER THE PUBLIC IRRIGATION LAW, AND FOR OTHER PURPOSES.

Be it Enacted by the Legislature of Porto Rico:

SECTION 1. That a special tax is hereby levied in addition to other taxes already fixed by law, on all parcels of

land which for irrigation purposes are supplied with water from the southern coast public irrigation system constructed and in operation pursuant to the provisions of the Public Irrigation Law and amendments thereto, but which under the present Irrigation Law in no way contribute to the payment of expenses for the maintenance of said system.

SECTION 2. That the tax to be levied on each tract of land receiving water from the irrigation system, but which under the law in force does not contribute towards defraying the cost of such system, shall be classified as follows: The Treasurer of Porto Rico shall have charge of fixing the total number of acres receiving water from the irrigation system which includes: (1) tracts of lands subject to taxation pursuant to the provisions of the public irrigation law and amendments thereto, for the purpose of reimbursing the cost of the irrigation works; (2) tracts of land to which the Irrigation Commission acknowledged the right to the use of water or to which such right was acknowledged by the courts in cases of appeal, as rights acquired under the law for the use of water under prior concessions; (3) tracts of land irrigated with water delivered in accordance with acquired rights or concessions which have not been assigned, which said water, pursuant to the terms of the contracts entered into with the Commissioner of the Interior or because of decisions of the Irrigation Commission, is delivered in whole or in part and is measured at the canals of the Irrigation Service system, and such tracts shall be determined by dividing the value of the said concessions in acre-feet per year, as the same may be or shall have been fixed by the Commissioner of the Interior, by the Irrigation Commission or by decision of the courts, by four,—that is to say, by the number of acre-feet per year established by the Public Irrigation Law as a normal rate for delivery per acre for the formation of the irrigation district; (4) parcels of land irrigated by water supplied because of acquired rights or concessions which have not been

assigned, which said water, pursuant to the terms of the contracts entered into with the Commissioner of the Interior or under decisions of the Irrigation Commission, is taken and measured in the rivers at the points of intake indicated in the said concessions; and such tracts shall be determined by dividing the value of the said concessions in acre-feet per year, as the same may be or as shall have been fixed by the Commissioner of the Interior, by the Irrigation Commission or by decision of the courts in cases of appeal, by five. The Treasurer of Porto Rico shall then take amount estimated or certified to as estimated by the Commissioner of the Interior for defraying the cost of operations and maintenance of the irrigation system during the following fiscal year (as provided under Section 11 of Act 128, approved August 8, 1913, which amends the Irrigation Law approved September 18, 1908), and shall add thereto or subtract therefrom, as the case may be, any resulting deficit between or surplus over, the amount expended and certified to as expended by the Commissioner of the Interior for expenses of operation and maintenance of the irrigation system during the preceding fiscal year, and the amount estimated or certified to as estimated by the Commissioner of the Interior for defraying the cost of operation and maintenance of the irrigation system during the aforesaid preceding fiscal year. The Treasurer shall then divide the amount so determined by the total number of acres computed as hereinbefore provided, and the result shall be and shall constitute the tax per acre which shall be levied during said subsequent fiscal year on all tracts supplied with water from the southern coast public irrigation system, and which in no other manner are subject to the payment of a tax to meet the cost of the said irrigation system.

This tax shall be levied and collected by the Treasurer of Porto Rico at the same time as any other tax imposed by the Public Irrigation Law, and the moneys collected shall be covered into the Insular Treasury to the credit of a special trust fund known as the "Irrigation Fund," to be

invested in the same manner and for the same purposes provided by the Public Irrigation Law and laws amendatory thereof.

SECTION 3. All laws or parts of laws in conflict herewith are hereby repealed.

SECTION 4. This Act shall take effect ninety days after its approval.

Approved, July 8, 1921.

Extracts from the Irrigation Law of Porto Rico (Laws of Porto Rico, Special Session, 1908, pages 44 to 70.)

AN ACT

TO PROVIDE FOR THE CONSTRUCTION OF AN IRRIGATION SYSTEM, AND TO PROVIDE REVENUES THEREFOR; FOR THE TEMPORARY APPROPRIATION OF TWO HUNDRED THOUSAND DOLLARS TO BEGIN SUCH WORK, AND FOR OTHER PURPOSES.

Be it Enacted by the Legislative Assembly of Porto Rico:

Section 1.—The sum of two hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any moneys in the Treasury not otherwise appropriated, for the purpose of carrying to completion the preparation of working plans and specifications for the construction of an irrigation system for the district situated approximately between the river Patillas on the east and the river Portugues on the west, and irrigable lands on both sides of both rivers and for the commencement and prosecution of the work of construction thereof, and expenses in connection therewith, until such time as sufficient funds shall be available in the Treasury from the sale of the bonds provided for such purpose by legislative enactment.

Section 3.—The proceeds of the sale of the bonds and all moneys accruing by reason of assessments of taxes and sales of water and power within the irrigation district shall, subject to the provisions of Section 29 of this Act, be deposited in the Treasury of Porto Rico, in a trust fund to be known as the "Irrigation Fund", which fund may be subdivided for statistical purposes as the Auditor may prescribe. All expenditures for the construction and maintenance of the irrigation system, and all payments of interest and principal of any debt incurred for the construction of the said system, shall be payable from the said trust fund upon warrant of the Auditor countersigned by the Governor.

Section 11.—Should it at any time appear that there is a surplus of water over and above the amount necessary to irrigate all the lands of the irrigation District, the Commissioner of the Interior shall proceed to sell such surplus water, on public calls for bids upon terms to be approved by the Executive Council, the proceeds of such sale to be covered into the Irrigation Fund.

Section 12.—The irrigation engineer herein provided, his officers, agents, or employees, shall have the right to enter, after notifying the owner or his representative, upon any lands to make surveys and to locate and establish any of the works contemplated or embraced in said irrigation system, including the lines of any canal, road, tunnel, reservoir site, aqueduct, power station, transmission lines or other requisite, but indemnity shall be paid to the owner for such damages as he may incur in consequence of said works. The Commissioner of the Interior shall have power, when necessary, to initiate suits for condemnation in the name of The People of Porto Rico for the acquisition of any land or right embraced within the approved plans of the said irrigation project, and for the purpose of such condemnation proceeding all land and water rights, all rights

of way for the transmission of water and electric currents; all sites for reservoirs, canals, roads, tunnels, aqueducts, ditches, power stations, and other things embraced in and contemplated by said irrigation plan so approved, are hereby declared to be works of public utility, and as such are hereby declared subject to the power of eminent domain and open to expropriation proceedings in the manner provided by law. *Provided, however*, that all said rights and things, together with any existing and outstanding water rights not theretofore surrendered to The People of Porto Rico may be made subject of condemnation proceedings without compliance with those provisions of law requiring a declaration of public utility by the Executive Council pursuant to the Act approved March 12, 1908, entitled "An Act to amend an act entitled 'An Act to provide for the condemnation of private property for the purposes and under the conditions therein named', approved March 12, 1903," or any other provisions relating to declarations of public utility *and provided, further* that the Executive Council shall at all times have authority to acquire for said irrigation system such rights and things wherever possible, by settlement out of court to avoid condemnation proceedings.

Extracts from the 1913 Amendments to the Irrigation Law of Porto Rico (Laws of Porto Rico, Extraordinary Session, 1913, pages 54 to 84.)

AN ACT

TO AMEND CERTAIN SECTIONS OF THE PUBLIC IRRIGATION LAW, APPROVED SEPTEMBER 18, 1908, AS AMENDED;

TO AMEND CERTAIN OTHER LAWS RELATING TO THE IRRIGATION SYSTEM, AND THE ISSUE OF BONDS THEREFOR;

TO PROVIDE FOR THE FORMATION OF A TEMPORARY AND A PERMANENT IRRIGATION DISTRICT;

TO PROVIDE THE NECESSARY ADDITIONAL FUNDS FOR THE COMPLETION OF THE IRRIGATION SYSTEM, AND FOR MEETING THE OBLIGATIONS OF THE OUTSTANDING IRRIGATION BONDS, AND FOR THE OPERATION AND MAINTENANCE OF THE IRRIGATION SYSTEM UNTIL THE COMPLETION OF THE SAME, OR UNTIL SUFFICIENT FUNDS MAY BE RAISED THEREFOR FROM THE ASSESSMENTS UPON THE IRRIGABLE LANDS WHICH SHALL BE INCLUDED IN THE TEMPORARY OR IN THE PERMANENT IRRIGATION DISTRICTS HEREIN PROVIDED FOR, OR FROM OTHER REVENUES DERIVED FROM THE SAID IRRIGATION SYSTEM; AND FOR OTHER PURPOSES.

Be it enacted by the Legislative Assembly of Porto Rico:

SECTION 2.—That the said Irrigation Commission shall have the power, and are hereby directed, to fix, according to the provisions hereinafter contained, the geographical boundaries of both a temporary and a permanent irrigation district; to determine what irrigable land shall be included therein; and to determine, as hereinafter provided, the value of water rights or concessions, and the basis for the computation of credits to be given on account thereof, on the taxes to be assessed as hereinafter provided upon the lands to which the said water rights or concessions are appurtenant.

SECTION 7.—During the existence of the temporary irrigation district the Irrigation Commission shall have the power and is hereby directed to fix the boundaries of a permanent irrigation district, and to determine what irrigable lands are to be included therein. For the purpose of determining the said permanent irrigation district, the Irrigation Commission shall examine critically each tract or local subdivision which might be included in the said permanent irrigation district, examining not only the lands which were included in the temporary irrigation district, but also any lands not included in the said temporary irrigation district, but which, in their judgment, might be included in the said permanent irrigation district, with a view to determining what lands are so located and of such a nature that they can be profitably and successfully irrigated under the Public Irrigation Law, as amended, and as herein provided. It shall give due consideration to all water rights or concessions heretofore granted, also, as far as practicable, to the results and effects of the operation of the irrigation system during the existence of the temporary irrigation district, and shall include in the said permanent irrigation district such lands, and only such lands, as in the judgment of the Irrigation Commission are so located and of such a nature that they will receive by forming a part of the permanent irrigation district a benefit greater in amount than the total cost or burden imposed by law upon the said lands, as hereinafter provided.

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The said Irrigation Commission shall determine as to each water right or concession which is appurtenant to any tract of land, and which has been relinquished or transferred to The People of Porto Rico, and which shall not already have been valued by agreement reached between a representative or representatives of The People of Porto Rico and the owner or owners of the land to which the said water right or concession is appurtenant, its fair equivalent in value, stated in acre feet, per annum, reasonably

distributed throughout the year; *Provided, however, That* in no case shall the equivalent allowed for any such water right or concession be greater than the amount of water granted by, and beneficially used under, the said water right or concession as originally granted or as legally construed or limited.

The said Irrigation Commission shall then determine the basis for the computation of credits to be given on account of each relinquished water right or concession appurtenant to land included in the permanent irrigation district, upon the taxes assessed upon the said land, complying in all respects with the provisions of the contract, if any, for the relinquishment of the said water right or concession, and giving due consideration, in determining the basis for the said computation, to the conditions of the said contract of relinquishment and the extent to which the said water right or concession has, in effect, been relinquished. The Irrigation Commission shall compile a report of their findings as to the above basis for the computation of credits on taxation, stating in each case the percentage which the said credit shall bear to the total taxation which, but for such credit, would fall upon the lands to which the said water rights or concessions are appurtenant.

SECTION 11.—The amount that shall be assessed and levied upon a given tract of land included in the permanent irrigation district shall be determined as follows:

The Treasurer of Porto Rico shall calculate the amount of the interest and principal or sinking fund due upon outstanding irrigation bonds for the ensuing fiscal year and shall add thereto the total amount due upon credits for the ensuing year on account of water rights or concessions; and shall further add thereto the amount estimated and certified as estimated to him by the Commissioner of the Interior for the cost of operation and maintenance of the irrigation system for the said ensuing fiscal year. He shall then either add to or subtract from the amount so obtained the esti-

mated amount of any deficit or surplus, as the case may be, existing in connection with the Irrigation Fund from the operations of the current fiscal year. From this amount he shall subtract the amount estimated and certified as estimated to him by the Commissioner of the Interior as the receipts for the ensuing fiscal year from any water power developed in connection with the irrigation system (until such time as the total bonded indebtedness incurred on account of the irrigation system shall have been paid in full); and the amount estimated and certified as estimated to him by the Commissioner of the Interior as receipts for the ensuing fiscal year from any other sources except from the issues of bonds and from special assessments herein provided for to be levied upon the land in the permanent irrigation district. To the amount so determined the Treasurer shall add an amount equivalent to two per centum of the total as a margin of safety for delayed collections, and the amount thus determined by the Treasurer of Porto Rico, subject to the limitations and provisions hereinafter set forth, shall be and constitute the total sum assessed for the said fiscal year, and the same shall be levied upon the lands at the time included in the permanent irrigation district (including any lands owned by The People of Porto Rico which form part of the said district, which lands shall be liable for and pay taxes levied hereunder in the same manner as the other lands included in the said irrigation district);

The amount of credit on taxes to which any tract of land having a water right or concession shall be entitled on account of the relinquishment of the same shall be such percentage of such taxes as shall have been determined by the Irrigation Commission as hereinbefore provided.

No tract of land included in the permanent irrigation district shall pay any tax until it shall have received or have been offered water from the irrigation system for a period of twelve months (said water to have been received after the inclusion of the said land in the temporary irri-

gation district, or, if the said land is first included in the permanent irrigation district, after the said inclusion); but thereafter the said tract of land shall be liable at the regular assessment dates to the same assessments as would have been the case had all the lands in the permanent irrigation district been assessed under the provisions of this section; *Provided*, That the said tract of land shall pay a tax for the portion of the half year (either fiscal or calendar, as the case may be), if any, remaining after the completion of the said period of twelve months, for which no taxes are paid in accordance with the foregoing provisions, and the tax due for any such portion of a half year shall be payable upon the first of the month succeeding the completion of the said period of twelve months for which no taxes are paid in accordance with the foregoing provisions.

Assessments under the foregoing provisions shall be made upon each particular tract of land in the proportion that the area of such tract of land bears to the whole number of acres included in the said permanent irrigation district.

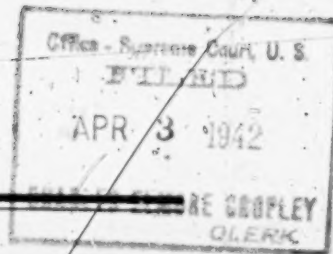
SECTION 13.—In the case of any land carrying a water right or concession of which the source of supply is destroyed or impaired by the construction or operation of the irrigation system, which shall not have been relinquished or surrendered to The People of Porto Rico, such land shall be entitled to receive from the irrigation system an amount of water which is the reasonable equivalent in value of the said water right or concession.

The Commissioner of the Interior is hereby authorized to negotiate with the owner or owners of such water rights or concessions, and with the owner or owners of any water rights or concessions heretofore relinquished or surrendered on condition that the lands to which they are appurtenant should form part of the irrigation district, and which lands have not been included by the Irrigation Commission, and the said Commissioner of the Interior shall be em-

powered to enter into agreements with such owner or owners as to the amount of water and the time, place and conditions of delivery thereof; which shall be delivered to the lands to which the said water rights or concessions are appurtenant as the fair equivalent in value thereof, with the power on behalf of the Irrigation Service to enter into agreement with such owner or owners for the relinquishment to The People of Porto Rico of such water rights or concessions, and for the delivery to the lands to which the said water rights or concessions are appurtenant of such fair equivalent. Before entering into any such agreement the Commissioner of the Interior shall consult the Attorney General of Porto Rico as to the validity and legal status of the water rights or concessions involved.

In the case of any water right or concession in connection with which no such contract or agreement is made prior to January 1, 1914, the Irrigation Commission shall have the power to decide as to the validity and the legal status of any such water right or concession; and in the case of valid and subsisting water rights or concessions to determine what amount of water must be delivered by the Irrigation Service to the lands to which such water rights or concessions are appurtenant.

FILE COPY



IN THE
Supreme Court of the United States

OCTOBER TERM, 1941

No. 95

THE PEOPLE OF PUERTO RICO,
Petitioner,
vs.
RUSSELL & Co., S. EN C.,
Respondent.

PETITION FOR REHEARING

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GEORGE A. MALCOLM,
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Petition for Rehearing

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1941

No. 95

THE PEOPLE OF PUERTO RICO,
Petitioner,

VS.

RUSSELL & Co., S. EN C.,
Respondent.

PETITION FOR REHEARING

*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Petitioner, The People of Puerto Rico, prays a reconsideration of the decision of this Court affirming the judgment of the Circuit Court of Appeals, First Circuit, which had reversed that of the Supreme Court of Puerto Rico. Petitioner prays that the order and judgment of this Court entered herein on March 16, 1942, be vacated, and that a re-argument of the case be ordered, and that, as prayed in the original petition for certiorari, the judgment of the Circuit Court of Appeals be reversed and vacated, and that of the insular Supreme Court be affirmed.

And in support of this petition for such reconsideration and re-argument and rehearing, this petitioner respectfully shows that the decision of this Court was by a divided Court, with a dissenting opinion in which four of the Justices of the Court joined; and petitioner respectfully suggests that the prevailing majority opinion

overlooks the established rule and doctrine of this Court in relation to decisions of Territorial courts of last resort, including particularly the Supreme Court of Puerto Rico, that the decision of such a court interpreting a local statute or local contract is to be respected and not overthrown unless "inescapably" wrong, even though it be different from the interpretation which this Court might itself consider the more reasonable one.

In the present case four of the Justices of this Court agree with the insular Supreme Court's interpretation of the local statute and the local contracts upon which the case turns. It is respectfully submitted that that fact alone is in itself sufficient to indicate that the insular court's interpretation is not so necessarily or "inescapably" wrong as to justify its being overthrown, under the rule heretofore established by a long chain of decisions of this Court.

The long-established continuity of the rule, and its importance as a crystallization of one of the cardinal underlying principles concerning the relation of Territorial governments to the Federal Government, have been emphasized in recent decisions here. It will be remembered that this Court said in *Sancho Bonet, Treasurer of Puerto Rico vs. The Texas Company*, 308 U. S. 463, 470-471:

"For over sixty years this Court has consistently recognized the deference due interpretations of local law by such local courts unless they appeared to be clearly wrong. From *Sweeney v. Lomme*, 22 Wall. 208, decided in 1874, to *Bonet v. Yabucoa Sugar Co.*, *supra*,¹ decided in 1939, repeated admonitions to that effect have been given. That rule is founded on sound policy. As this court recently stated, 'Orderly development of the government of Puerto Rico as an integral part of our governmental system is well served by a careful and consistent adherence to the legislative and judicial policy of deferring to the local

¹306 U. S. 505, 509-511.

procedure and tribunals of the Island.' *Bowet v. Yabucoa Sugar Co.*, *supra*, p. 510.

"We now repeat once more that admonition. . . .

To reverse a judgment of a Puerto Rican tribunal on such a local matter as the interpretation of an act of the local legislature, it would not be sufficient if we or the Circuit Court of Appeals merely disagreed with that interpretation. Nor would it be enough that the Puerto Rican tribunal chose what might seem, on appeal, to be the less reasonable of two possible interpretations. And such judgment of reversal would not be sustained here even though we felt that of several possible interpretations that of the Circuit Court of Appeals was the most reasonable one. For to justify reversal in such cases, the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous.

"Measured by such a test the judgment of the Supreme Court of Puerto Rico should not have been reversed." (*Italics supplied.*)

The same rule was recognized and relied upon by this Court in other recent decisions, notably in *Waialua Agricultural Co. vs. Christian*, 305 U. S. 91, 108-110, and in its decision in case No. 96 at the present term, *The People of Puerto Rico vs. Rubert Hermanos, Inc.*, decided March 16, 1942 (*Opinion*, p. 6-7).

In the present case, as above indicated, the decision necessarily turned upon the insular Supreme Court's interpretation of the language of the 1914 contracts and of the insular statute of 1913, under which the Commissioner of the Interior entered into the contracts on behalf of the insular government,—particularly of the connotation to be given the word "delivery" as used in that local statute and in those local Puerto Rican contracts. The respondent company contended, and the majority opinion of this Court holds, that the insular Supreme Court was wrong in holding that that phraseology, in view of all the circumstances and the local background of law and fact, was not to be interpreted as necessarily binding the in-

sular government to pay for the cost of bringing the water to the points where the company was to receive it under the contracts; and that, therefore, the Circuit Court of Appeals did not err in overruling the insular Supreme Court in this respect. The four dissenting Justices of this Court, to the contrary, agree with the insular Supreme Court's views in the interpretation of the statute and the contracts.

The prevailing majority opinion holds (*Opinion*, p. 6), after quoting the language of Section 13 of the Act of 1913, which used the words "delivery", and "shall be delivered to the lands":

"We think it evident from this language that the Commissioner was not limited to agreeing to allot to the land-owner a certain amount of water but was empowered to stipulate that at certain times he would cause to be delivered, at specified places, the water which respondent was to receive as the equivalent of that which it had formerly been entitled to take at its intakes along the river. That the Commissioner so construed his authority is plain from the terms of the contracts";

and again (*Opinion*, p. 7):

"From the four corners of the agreements it is clear that, in consideration of the suspension of the rights of Fortuna, and its successor, the respondent, the insular government agreed not merely to allot, but to deliver, at specified places, certain quantities of water. * * *. This fact is emphasized by the provision that, if it desires delivery at other places than those specified in the contracts, it shall bear the expense entailed by the change."

To the contrary, the dissenting opinion of MR. JUSTICE DOUGLAS in which MR. JUSTICE BLACK, MR. JUSTICE MURPHY, and MR. JUSTICE BYRNES join, says (*ibid.* pp. 9-10):

"The contracts, as well as the statute, speak of 'delivery' of the water. But the Supreme Court of

Puerto Rico interpreted the contracts as meaning that respondent 'agreed to *receive* [italics supplied]² from the irrigation system a certain quantity of water in exchange for its water rights. I do not think that that construction is unwarranted.

"(1) The contracts themselves make plain that as respects certain intakes on the river 'the presence of water in the river, bed . . . in quantities sufficient to permit the taking at the said intakes, of the amounts of water specified shall be deemed to be deliveries'. That provision alone demonstrates that the Supreme Court of Puerto Rico was justified in interpreting 'delivery' in these contracts differently than might be warranted in case of contracts for the cartage of goods. 'The word "deliver" has perhaps as many different shades of meaning ascertained by judicial interpretation as any other term known to the law.' *United States v. McCready*, 11 Fed. 225, 234. The problems of operation of an irrigation system are unique in many respects. Manipulation of the gates at the dam determines the flow of water through the various channels. Puerto Rico's undertaking in each instance was to 'deliver' water at specified intakes provided by respondent. Those intakes were in the river or in designated reservoirs provided by respondent. It seems reasonable to conclude that Puerto Rico's undertaking was to make the specified quantities of water available so that they would be received at those intakes. To enforce the present tax is not to renig on that undertaking. The fact that respondent was to bear 'all extra expenses' in case water was delivered at intakes other than the designated ones seems to me hardly more than a provision that respondent was to bear the cost in case the irrigation system had to be partially relocated to meet its requirements. In any event, it does no more than raise a doubt as to the correct interpretation of the contract—a doubt which, as subsequently pointed out, should not be resolved against the power of Puerto Rico to impose this tax.

²"Supplied" in the dissenting opinion itself.

“(2) It seems to me tolerably clear that such a construction of the contracts comports with the purpose of the arrangement. * * *”

The dissenting opinion goes on to invite attention (pp. 11-12) to the applicability of the established rule that the granting away of the taxing power “is never to be assumed”, and that “If there are doubts, they must be resolved in favor of the government”; that “If there be any doubt on these matters, * * * the exemption does not exist³”; and concludes (p. 12):

“The meaning of the word ‘delivery’ as used in the contracts is at best ambiguous. Hence, we should strictly adhere to the presumption against exemption from taxation. To resolve all ambiguities in the contracts in respondent’s favor and against Puerto Rico is to forsake a canon of construction which has long obtained.

“In conclusion, Puerto Rico has not treated respondent the same as landowners who have no water rights. The latter have to pay for the construction of the irrigation system as well as for its maintenance and operation. Respondent on the other hand is merely required to contribute toward the cost of maintenance and operation of the system. On these facts that favored treatment is sufficient respect for the integrity of respondent’s property rights. To free it from all burden is to give it a windfall. Only under the compulsion of plain unambiguous language should we permit a beneficiary of such a project to escape his fair share of the costs. There is no such compulsion here.”

The long established rule of this Court as to the respect to be accorded to decisions of a Territorial court of last resort interpreting local contracts and local statutes is one of the fundamental principles of the relation be-

³ Citing *Providence Bank v. Billings*, 4 Pet. 514, 561; *Wells v. Savannah*, 181 U. S. 531; *Chicago Theological Seminary v. Illinois*, 188 U. S. 662; *Metropolitan Street Ry. Co. v. New York*, 199 U. S. 1, 35-36.

tween the quasi-sovereign Territorial governments and the federal government. As to the general purpose of the Congress in framing the Territorial governments, and particularly with relation to the Territorial government of Puerto Rico, this court, in the *Shell Company* case, after referring to the provisions of the Organic Act for Puerto Rico, said (*Puerto Rico vs. The Shell Co.*, 302 U. S. 253, 260-261):

"These provisions do not differ in substance from the various provisions relating to the powers of the organized and incorporated continental territories of the United States, in respect of which this court said in *Clinton v. Englebrecht*, 13 Wall. 434, 441, that the theory upon which these territories have been organized 'has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress'; and in *Hornbuckle v. Toombs*, 18 Wall. 648, 655-656, we said: 'The powers thus exercised by the Territorial legislatures are nearly as extensive as those exercised by any State legislature.'

• • • (at p. 260)

"2. The aim of the Foraker Act⁴ and the Organic⁵ Act was to give Puerto Rico full power of local self-determination, with an autonomy similar to that of the states and incorporated territories. *Gromer v. Standard Dredging Co.*, 224 U. S. 362, 370; *Porto Rico v. Rosaly y Castillo*, *supra*,⁶ p. 274. The effect was to confer upon the territory many of the attributes of a quasi-sovereignty possessed by the states—as, for example, immunity from suit without their consent. *Porto Rico v. Rosaly y Castillo*, *supra*. By those acts, the typical American governmental structure, consisting of the three independent departments—legislative, executive and judicial—was erected. 'A body politic'—a commonwealth—was created, 31 Stat. Sec. 7, c. 191. The power of taxation, the

⁴ First Organic Act, April 12, 1900, c. 191, 31 Stat. 77.

⁵ Act of March 2, 1917, c. 145, 39 Stat. 951.

⁶ 227 U. S. 270.

power to enact and enforce laws, and other characteristically governmental powers were vested."

And this Court has emphatically recognized the tripartite character and the coordinate powers of the three great departments,—the executive, the legislative, and the judicial—as "*implicit in all*" the territorial governments established by the Congress (*Springer vs. Philippine Islands*, 277 U.S. 189, 201). The Organic Act for Puerto Rico⁷ likewise recognizes this, emphatically. It places the "supreme executive power" (Sec. 12) in the governor; "all local legislative powers" (Secs. 25, 37) in the legislature; and directs that "the judicial power shall be vested" (Sec. 40) in the supreme court of Puerto Rico and the inferior insular courts.

As to the legislative power the Congress reserved to itself (Sec. 34) "the power and authority to annul" all acts of the legislature,—as it has habitually done in organic acts for Territories, at least ever since the organic act for Wisconsin Territory, April 20, 1836 (Sec. 6; 5 Stat. 10, 12-13). But with relation to acts of Territorial legislatures *the Congress has practically never exercised the power to annul*; and has never done so with relation to Puerto Rico. As to the legislative branch of the Territorial governments, it has become thoroughly established,—and has been recognized by this Court in repeated decisions, as indicated in the opinion in the *Shell Company* case above quoted,—that "The powers thus exercised by the Territorial legislature are nearly as extensive as those exercised by any State legislature", and that, with the exceptions noted in the Organic Act itself, "the power of the Territorial legislature was apparently as plenary as that of the legislature of a State".

The long chain of the decisions of this court,⁸—begin-

⁷ Act of March 2, 1917, c. 145, 39 Stat. 951, 955, 958, 961, 964, 965.

⁸ 1874—(Montana Territory)—*Sweeney v. Lomme*, 22 Wall. (89 U. S.) 208, 213. MILLER, J.

ning as far back as *Sweeny v. Lomme*, 22 Wall. (89 U. S.) 208, 213, in 1874, and coming down in unbroken sequence to the recent decisions in *Waialua Agricultural Co. v. Christian*, 305 U. S. 91, 108-110, *supra*; *Inter-Island Co. v. Hawaii*, 305 U. S. 306, 311; *Sancho Bonet, Treasurer v. Yabucoa Sugar Co.*, *supra*, 306 U. S. 505, 509-511; with *Sancho Bonet, Treasurer v. The Texas Co.*, *supra*, 308 U. S. 463, 470-472, and the decision in case No. 96 at this term, on March 16, 1942, in *People of Puerto Rico v. Rubert Hermanos, Inc.*—constitute, with reference to the *coordinate judicial department* of the Territorial government, like recognition of the respect to be accorded to that co-ordinate branch, along lines parallel to the Congressional and judicial recognition above noted of the respect to be accorded to the legislative branch of

1894—(Dakota Territory)—*Northern Pac. R. Co. v. Hamblly*, 154 U. S. 349, 361.

[Supreme Court of Territory; although this case not decided until after Statehood:

“We may safely assume that the construction thus given to this statute will not be overruled by the courts of the two States which have succeeded the Supreme Court of the Territory without most cogent reasons for their action.”] BROWN, J.; [The CH. J. (FULLER), FIELD and HARLAN, dissenting].

1895—(Utah Territory)—*Fox v. Haarstick*, 156 U. S. 674, 679. SHIRAS, J.

1897—(Utah Territory)—*Whitney vs. Fox*, 166 U. S. 637, 647. HARLAN, J.

1901—(New Mexico Territory)—*Armijo v. Armijo*, 181 U. S. 558, 561. PECKHAM, J.

1907—(Arizona Territory)—*Copper Queen Min. Co. v. Arizona Board*, 206 U. S. 474, 479. HOLMES, J.

1908—(Arizona Territory)—*Lewis v. Herrera*, 208 U. S. 309, 314. FULLER, J.

(New Mexico Territory)—*Crary v. Dye*, 208 U. S. 515, 519. MCKENNA, J.

those governments; and that what was said by this Court as to the character of those governments three-quarters of a century ago in *Clinton v. Englebrecht*, *supra*, 13 Wallace (80 U. S.) 434, 441, and quoted again by this Court in the *Shell-Company case*, as above (*ante*, p. 7), that:

“The theory upon which the various governments for portions of the territory of the United States have been organized, has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority and with certain fundamental principles established by Congress”,

is just as applicable to the exercise of the local judicial power by the insular Supreme Court as it is to the exercise of the local legislative power by the insular

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- (Hawaii)—*Kealoha v. Castle*, 210 U. S. 149, 153-154. WHITE, CH. J.
- 1909—(Arizona Territory)—*English vs. Territory Arizona*, 214 U. S. 359, 361, 363. MCKENNA, J.
- (New Mexico Territory)—*Santa Fe County v. Coler*, 215 U. S. 296, 305. MCKENNA, J.
- 1910—(New Mexico Territory)—*Albright v. Sandoval*, 216 U. S. 331, 339. MCKENNA, J.
- (Puerto Rico)—*Garcia Maytin v. Vela*, 216 U. S. 598, 601. HOLMES, J.
- 1911—(Hawaii)—*Lewers & Cooke v. Atcherly*, 222 U. S. 285, 294. (~~Arizona Territory~~). HOLMES, J.
- 1912—(Arizona Territory)—*Treat v. Grand Canyon Ry. Co.*, 222 U. S. 448, 451-452. HOLMES, J.
- (Philippine Islands)—*Ker v. Couden*, 223 U. S. 268, 279. HOLMES, J.
- (Arizona Territory)—*Clason v. Matko*, 223 U. S. 646, 653. MCKENNA, J.
- 1913—(New Mexico Territory)—*Gray v. Taylor*, 227 U. S. 51, 56-57. HOLMES, J.
- (Puerto Rico)—*Cordova v. Folgueras*, 227 U. S. 375, 378-379. HOLMES, J.

Legislature. The Congress by the Organic Act has granted "the judicial power" to the insular Supreme Court and the inferior insular courts by Section 40 of the Act, in just as full measure, and without restriction, equally as it has granted all local legislative powers to the Legislature by Sections 25 and 37 of the Act. And likewise, habitually, in Territorial organic acts, it has granted the local judicial power on the one hand to the local Territorial courts, just as it has granted the local legislative powers on the other hand to the local legislatures, and as it has granted the local executive power to the governor.

- (Arizona Territory)—*Phoenix Ry. Co. v. Landis*,
231 U. S. 578, 579-580. HUGHES, J.
- 1914—(New Mexico Territory)—*Santa Fe Ry. Co. v. Friday*, 232 U. S. 694, 700. HOLMES, J.
- (Puerto Rico)—*Nadal v. May*, 233 U. S. 447, 454.
HOLMES, J.
- 1915—(Philippine Islands)—*Villanueva v. Villanueva*,
239 U. S. 293, 298-299. WHITE, CH. J.
- 1916—(Puerto Rico)—*Cardona v. Quinones*, 240 U. S.
83, 88. WHITE, CH. J.
- 1923—(Puerto Rico)—*Diaz v. Gonzalez*, 261 U. S. 102,
105-106. HOLMES, J.
- 1937—(Puerto Rico)—*Matos v. Alonso Hermanos*, 300
U. S. 429, 432. MC REYNOLDS, J.
- 1938—(Hawaii)—*Waialua Agricultural Co. v. Christian*,
305 U. S. 91, 108-110. REED, J.
- (Hawaii)—*Inter-Island Steam Nav. Co. v. Territory of Hawaii*, 305 U. S. 306, 311. BLACK, J.
- 1939—(Puerto Rico)—*Sancho Bonet, Treasurer v. Yabucoa Sugar Co.*, 306 U. S. 505, 509-511.
BLACK, J.
- 1940—(Puerto Rico)—*Sancho Bonet, Treasurer v. Texas Company*, 308 U. S. 463, 470-472.
DOUGLAS, J.
- 1942—(Puerto Rico)—*People of Puerto Rico v. Rubert Hermanos, Inc., et al.*, Case No. 96, decided March 16, 1942; *Opinion* 6-7.
BYRNES, J.—[The CH. J. and ROBERTS, J. dissenting.]

The Congress accordingly planned the personnel of the Supreme Court of Puerto Rico to be that of a court of dignity and responsibility. The Justices are appointed for life, by the President, by and with the advice and consent of the Senate of the United States.

The long chain of decisions of this Court recognizing the respect to be accorded to decisions of the local Territorial courts in local matters, in interpreting local statutes and local contracts, and the like, is, therefore, only the just,—and long settled,—recognition of the fact that it comports with the status, and the dignity, intended by the Congress to be conferred upon the Territorial courts by the grant of the judicial power, for this Court to recognize and to respect the finality of their decisions, in like manner as the Congress has habitually over all the years respected the finality of the decisions of the various Territorial legislatures in legislative matters, and has refrained from exercising its reserved power of censoring them by annulment. It is but the due recognition, as to one great department of the government, the judicial, as it has likewise been given to another, the legislative, that as to the entire Territorial government and every branch of it alike, the general Congressional purpose, upon which for a century and a half, as above quoted, the various Territorial governments have been organized,

“has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by Congress.”

In accordance with that great principle this Court, in this long unbroken chain of decisions for three-quarters of a century now, has adhered to the doctrine that, as it was phrased in *Waialua Co. v. Christian*, *supra*, 305 U. S. 91, 109-110:

"While the 34th section of the Judiciary Act is not applicable to territories, the arguments of policy in favor of having the state courts declare the law of the state are applicable to the question of whether or not territorial courts should declare the law of the territories with the least possible interference. It is true that under the appeal statute the lower court had complete power to reverse any ruling of the territorial court on law or fact; but we are of the opinion that this power should be exercised only in cases of manifest error. * * * In so far as the decisions of the Supreme Court of Hawaii are in conformity with the Constitution and applicable statutes of the United States and are not manifestly erroneous in their statement or application of governing principles, they are to be accepted as stating the law of the Territory. Unless there is a clear departure from ordinary legal principles, the preference of a federal court as to the correct rule of general or local law should not be imposed upon Hawaii.

"*Decision of the Supreme Court of Hawaii.* To adopt the legal principles applied by the territorial supreme court in these cases as rules of decision in that jurisdiction, or to construe instruments as it interpreted them, is not manifest error."

And in the *Texas Company* case, *supra*, applying it concretely to Puerto Rico,

"To reverse a judgment of a Puerto Rican tribunal on such a local matter * * *, it would not be sufficient if we * * * merely disagreed with that interpretation. * * * For to justify reversal in such cases * * * the interpretation must be inescapably wrong; the decision must be patently erroneous."

It is respectfully submitted that it should be held and established by this Court, as a necessary corollary to that rule, that whenever, as in this case, the interpretation of a local statute or a local contract by the Territorial supreme court is sufficiently reasonable so that it commands the assent of more than one,—(as here, of four),—of the Justices of this Court, then it is not to be consid-

ered as "inescapably wrong" within the meaning of that rule; and should not be overthrown. Such a corollary appears to be a necessary adjunct to the rule, and is believed to be but an embodiment of the deference and respect fairly due to the judicial authority of the *quasi*-sovereign government of the People of the Territory; and to be, indeed, necessarily inherent in the rule expressed in the long chain of the decisions of this Court.

It is, therefore, earnestly requested on behalf of the insular government of the People of Puerto Rico that a rehearing and reargument be granted in this case.

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SUPREME COURT OF THE UNITED STATES.

No. 95.—OCTOBER TERM, 1941.

The People of Puerto Rico, Petitioner,	} On Writ of Certiorari to the United States Cir- cuit Court of Appeals for the First Circuit.
vs. Russell & Co., Soren C.	

[March 16, 1942.]

Mr. Justice ROBERTS delivered the opinion of the Court.

The question for decision is whether a statute of Puerto Rico impairs the obligation of certain contracts in violation of the Island's organic law.¹

The respondent's predecessor in title, Fortuna Estates, as owner or lessee of lands adjacent to the Jacaguas River, enjoyed under Spanish law, and respondent, as successor, still enjoys, rights appurtenant to the lands to draw from the river 12,612.1 acre feet of water per year for irrigation.

Puerto Rico adopted a law in 1908² which authorized an irrigation system, as part of which a dam was to be erected in Jacaguas River above Fortuna's intakes. Fortuna's lands were not within or a part of the irrigation district. Although the operation of the system would interfere with Fortuna's water rights they were not condemned, as the statute permitted, nor were they voluntarily surrendered.

By an amendatory law adopted in 1913³ it was provided: "In the case of any land carrying a water right or concession of which the source of supply is destroyed or impaired by the construction or operation of the irrigation system, which shall not have been relinquished or surrendered to the People of Porto Rico, such land shall be entitled to receive from the irrigation system an amount of water which is the reasonable equivalent in value of the said water right or concession." This Act empowered the Commissioner of the Interior to make agreements with hold-

¹ "No law impairing the obligation of contracts shall be enacted." 48 U. S. C. § 737.

² Act of September 18, 1908, Laws of Porto Rico, 1909, p. 152.

³ Act of August 8, 1913, Laws of Porto Rico, 1914, p. 54, § 13.

ers of such rights fixing the amount and the time, place, and conditions of delivery, of water to be received as the equivalent of the rights suspended.

In the exercise of this authority the Commissioner executed contracts with Fortuna which called for the suspension of its rights appurtenant to two large tracts during the life of the contracts and assured delivery of a specified amount of water at Fortuna's intakes as the fair equivalent of the rights suspended.

Each contract enumerated the rights to take water appurtenant to a described tract of land which would be impaired or interrupted by the operation of the irrigation system; recited that the amount of water taken by Fortuna under its rights varied throughout the year, due to differences in rainfall, so that it was impossible to determine in advance the amount of water to which it would be entitled in any given period; and that Porto Rico was willing to deliver from the Jacaguas River the water to which Fortuna was entitled, but, in order to make the operation of the system more certain, desired to agree upon a fixed and regular amount which should be received by Fortuna as the fair equivalent in value for irrigation purposes of the water it would ordinarily take and use under its existing rights.

The contract then stated the agreement of the parties as to the quantities of water which, delivered in equal daily instalments, were to be considered such fair equivalents and the petitioner covenanted to deliver these quantities to Fortuna. It was also agreed that Fortuna might exercise its preexisting rights for ten days in each year to prevent their loss by non-user.

Under the Irrigation Law, lands in a district were subjected to a uniform annual assessment per acre to discharge the cost of construction, maintenance, and operation of the system. Sales were also made of surplus waters and the proceeds used for maintenance.

Shortly after the contracts were made, a controversy arose between petitioner and respondent with respect to Puerto Rico's right to sell surplus waters. Litigation ensued which terminated in a decree restraining the insular government from diverting certain surplus waters to which the respondent was held to be entitled under the contracts. The decision also upheld the validity of the contracts.⁴

⁴People of Porto Rico v. Russell & Co., 268 F. 723.

Thereupon the legislature adopted, July 8, 1921, "An Act Fixing a Tax on Certain Lands using water from the Southern Coast Public Irrigation System, on which lands no Tax What-ever was Levied under the Public Irrigation Law, and for Other Purposes."⁵ This is the statute enforcement of which is as-
serted to impair the obligation of the contracts. By this act a special tax is imposed on all lands supplied which, under exist-
ing law, contribute nothing to the expense of the maintenance of the system. The Treasurer of Puerto Rico is directed to com-
pute the tax by finding the aggregate acreage receiving water from the system including lands, like those of respondent, outside the district but receiving the equivalents of their pre-existing rights under contracts. He is to assess a prorata share of the total ex-
pense against the lands of respondent and others similarly cir-
cumstanced. The Act, as is admitted, was aimed only at those who, like respondent, had contracted for the receipt of water in lieu of that to which they were of right entitled and whose lands were not a part of the irrigation district.

Action was instituted by petitioner in an insular court for the recovery of several years taxes so imposed.⁶ The cause was removed to the United States District Court, where a motion to remand was denied and a judgment entered for the respondent on the merits. The judgment was affirmed by the Circuit Court of Appeals for the First Circuit,⁷ but was reversed by this court for want of diversity of citizenship on which jurisdiction of the federal courts depended.⁸

After remand, the case was tried in the insular district court and the complaint was dismissed on the merits, on the ground that Act No. 49, of 1921, was an invalid impairment of the obli-
gation of the 1914 contracts. The Supreme Court of Puerto Rico reversed and rendered judgment for the petitioner.⁹ The Circuit Court of Appeals in turn reversed and reinstated the judgment of the insular district court.¹⁰ We granted certiorari

⁵ Act 49 of 1921, Laws of Porto Rico, 1921, p. 366.

⁶ The preceding litigation and the necessity for bringing action for the tax rather than proceeding summarily will be found in *Gallardo v. Havemeyer*, 21 F. 2d 1012, and the Act of Congress of April 23, 1928, 45 Stat. 447.

⁷ 60 F. 2d 10.

⁸ *People of Puerto Rico v. Russell & Co.*, 288 U. S. 476.

⁹ 56 P. R. Dec. 343.

¹⁰ 118 F. 2d 225.

4 *The People of Puerto Rico vs. Russell & Co., S. en C.*

as the case presents an important question arising under the Insular Organic Act. We hold that the judgment of the Circuit Court of Appeals was right.

By the Act of 1908,¹¹ the people of Puerto Rico undertook the construction of a public irrigation system. This necessitated the erection of a dam for impounding and storage of part of the waters of the Jacaguas River above the respondent's intakes, and the creation of an irrigation district. The statute recognized the necessity of providing a method for the acquisition of the rights of riparian owners whose land lay below the dam. Section 12 authorized the condemnation of existing water rights and the payment of their fair value to the owners. By the amendatory Act of 1913, the owners of lands which fell within the irrigation district could release their preexisting rights, have them valued, and be paid the value by credits against their proportionate share of the expense of the construction and operation of the system.¹² By Section 13, owners of lands having water rights, whose source of supply would be destroyed or impaired by the construction or operation of the system, who had not surrendered or relinquished their rights, were declared entitled to receive from the irrigation system an amount of water which would be the reasonable equivalent in value of the right or concession so destroyed or impaired. The Commissioner was authorized to negotiate contracts to this end with such owners.

It is evident that it was thought that lands such as those of the respondent could not be included within the proposed district. It is idle to speculate concerning the reasons for this decision, though it is clear that in order to realize the Government's purpose it was deemed necessary to reach an accommodation concerning preexisting valid water rights of land owners whose lands could not or should not be included in the irrigation district. In the case of such persons the purpose was to substitute a fair equivalent for the rights theretofore exercised. Such an arrangement offered mutual advantages to Puerto Rico and to the owners. Whereas Fortuna had, prior to the erection of the dam, the right to take over 12,000 acre-feet of water per year for irrigation, a proportion of surplus waters, and certain torrential waters, the supply was uneven and uncertain due to the irregularity of rainfall. It was, therefore, an advantage to the respondent's prede-

¹¹ *Supra*, Note 2.

¹² *Supra*, Note 3.

cessor to surrender its maximum rights in consideration of an agreement that there should be delivered to it, equally and evenly throughout the year, something less than the maximum it was entitled to take under preexisting conditions. On the other hand, it was an advantage to the irrigation system that it should not be obliged at any time to deplete its storage waters by furnishing the respondent the maximum amount which, if the water were available, it was entitled to receive.

The Insular Supreme Court held that the exaction is not precluded by the contracts and works no impairment of their obligation. It held the exaction is a tax; that the rights which the respondent owned prior to the construction of the irrigation system were taxable, and that the privileges it enjoys under the contract are equally so; that the contract contains no covenant not to tax these rights or privileges, and, if it did, it would be beyond the power of the Commissioner. We cannot agree.

The assessment contemplated by Act No. 49 of 1921 is not a general tax laid for the support of government upon a property right or a franchise. This is expressly admitted by the petitioner in brief and in oral argument. In the brief it is said: "The special taxes or assessments here in question, if and when collected, will simply accrue to the special fund for the current operation and maintenance of the irrigation district, and thus serve only to lower the assessments upon other lands now taxed for such operation and maintenance. The insular Treasury can derive no direct benefit." And, in oral argument, counsel for petitioner frankly conceded that the money to be raised is not taxes in any way but merely an assessment against the respondent's land for the cost of delivering the water. If Puerto Rico had essayed to tax respondent's lands or its water rights by a general law, quite distinct questions would arise which we need not discuss.

Treated as an assessment of part of the cost of maintenance of the irrigation system, the petitioner insists that the exaction does not violate the obligation of the 1914 contracts. It asserts that the agreements were only that a given amount of water would be released, or made available, or allotted to respondent and therefore The People of Puerto Rico are free to charge to respondent the cost of delivering the water; and, further, that if the contracts, by their terms, precluded the imposition upon the respondent of this cost they are beyond the power of the Commissioner.

Section 13 of the Act of 1913 authorizes the Commissioner "to enter into agreements with such owner or owners as to the amount of water and the time, place and conditions of *delivery* thereof, which *shall be delivered to the lands* to which the said water rights or concessions are appurtenant as the fair equivalent in value thereof," We think it evident from this language that the Commissioner was not limited to agreeing to allow to the land-owner a certain amount of water but was empowered to stipulate that at certain times he would cause to be delivered, at specified places, the water which respondent was to receive as the equivalent of that which it had formerly been entitled to take at its intakes along the river. That the Commissioner so construed his authority is plain from the terms of the contracts.

Each contract describes the rights appurtenant to the lands in question, acknowledges their validity, states the amounts of water the respondent's predecessor is entitled to take, and, in consideration of the mutual covenants of the parties, stipulates "that the quantities of water specified" in the agreement, "delivered uniformly through the year, subject to the terms and conditions specified in this agreement, . . . are the fair equivalent in value of the water which the said Fortuna Estates takes under and pursuant to the concessions and water rights claimed by it, and The People of Porto Rico will, subject to the conditions and limitations hereinafter specified and at the times, places and subject to the conditions of delivery hereinafter provided for, *make delivery*" of the amounts of water specified in the agreement. Each contract further provides that "The People of Porto Rico will deliver the said water as follows". One agreement covenants that the water deliverable for some of the tracts shall be at the intakes provided by the owner, and that water deliverable to another tract shall in part be deliverable at such an intake and in part at a pumping station on the bank of the river. The right is reserved, upon notice by The People of Porto Rico, to change the place of delivery of certain of the water. It is further provided that if delivery at the points designated is temporarily interrupted, Porto Rico will deliver an equivalent amount of water at some other point. It is agreed that the presence of water in the river bed at the opening of the described intakes, sufficient to permit the owner to take the quantities specified in the agreement, shall be deemed a delivery within the meaning of the contract. A clause provides that

should the owner desire to take water for certain of the tracts at places other than the present intakes, Porto Rico will deliver the water at such other places but that "all extra expenses occasioned by such delivery shall be borne by" the owner.

The obligation of Porto Rico to deliver the named quantities is recognized in many clauses of the contracts. As applied to the petitioner, the word "deliver" appears ten times in each contract, the word "delivery" nine times, and the word "deliverable" four times, in one of the documents. From the four corners of the agreements it is clear that, in consideration of the suspension of the rights of Fortuna, and its successor, the respondent, the insular government agreed not merely to allot, but to deliver, at specified places, certain quantities of water. Prior to the execution of the contracts, Fortuna was under no obligation to the government to pay it any cost or expense for the bringing of the water to its intakes. The contract clearly contemplates that it is to be under none with respect to the water agreed to be delivered to it in lieu of that which it formerly had the right to take. This fact is emphasized by the provision that, if it desires delivery at other places than those specified in the contracts, it shall bear the expense entailed by the change.

The deficit in the maintenance cost of the system was met, for some time, by the sale of surplus water. The contract gives the respondent the right to a portion of such surplus water over and above the specified amounts to be delivered by the petitioner. The respondent sued to enjoin the petitioner from selling the surplus water to which it claimed to be entitled. The suit resulted in an injunction. The Government being thus deprived of the revenue theretofore used towards the maintenance of the system adopted the Act of 1921 with the evident purpose of recouping a portion of that expense from the respondent and others with whom it had made contracts in 1914 for the delivery of the stipulated amount of water to them without charge therefor. The history of the legislation shows that the proposed exaction was not a general tax but was an effort to collect from persons whose land was not in the irrigation system a portion of the expense of maintaining that system, whereas the contracts exempted them from contributing to such cost as a condition of receiving the stipulated amount of water from the system. This was a clear violation of the obligation of the contracts.

The judgment is affirmed.

Mr. Justice DOUGLAS, dissenting.

There was no provision whatsoever in the grant of these water rights exempting them from any form of taxation. Hence if no contract had been made and the irrigation system had been constructed and respondent's lands had been serviced in precisely the same way as was done here, I should think that there would be no doubt but that the assessment would be valid. The Supreme Court of Puerto Rico relied for the validity of the assessment on such cases as *Knowles v. New Saeedea Irrigation District*, 16 Ida. 217, 235, and *Bleakley v. Priest Rapids Irrigation District*, 168 Wash. 267. Those cases hold that under certain circumstances the owner of a water right may be brought into an irrigation district and forced to pay an assessment. As stated in the *Knowles* case (p. 241):

"Under our irrigation law as it existed at the time of the organization of this district and the assessments referred to were made, if the land of the plaintiff was properly included in said irrigation district, it was subject to assessment for benefits, provided it received any, whether the owner of said land owned a water right in connection therewith or not; for a person in an irrigation district may receive certain benefits regardless of whether the owner has a water right in connection therewith or not."

The reasons which permit the owner of a water right to be brought into an irrigation district are equally cogent here. For the impact of this assessment is not more rigorous than the assessment attendant on membership in an irrigation district. In fact, it is less, since respondent is being assessed only for a pro rata share of the cost of maintenance and operation of the system, not its construction.

It was clear and undisputed that respondent obtained substantial benefits from the irrigation system. (1) The quantity of water received by respondent from the system is 19% larger than what previously had been available from the earlier limited flow of the river. (2) The storage reservoir impounds flood waters which would be largely lost to respondent. The dam not only increases the amount of water available but makes possible regular and more continuous deliveries of the water. (3) The irrigation system has tapped new sources of water which feed the reservoir. No separation of that additional supply of water from the old supply is possible. As a result respondent obtains additional advantages

especially in dry years. (4) By reason of the construction and operation of the irrigation system the water is available at several different distribution points through canals rather than at the river bed alone.

In that posture of the case we would be faced with a determination by the legislature of Puerto Rico that respondent's lands were benefited and that respondent should pay an assessment. It has long been held that such a "determination is conclusive upon the owners and the courts". *Spencer v. Merchant*, 125 U. S. 345, 356. And see *Davidson v. New Orleans*, 96 U. S. 97; *Walston v. Nevin*, 128 U. S. 578. As stated in *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 176, 177, "the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry"; the choice of methods employed "is one of these matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discretion of the state legislature, and with which this court ought to have nothing to do." And see *French v. Barber Asphalt Paving Co.*, 181 U. S. 324; *Milheim v. Moffat Tunnel Improvement District*, 262 U. S. 710, 721; *Roberts v. Richland Irrigation District*, 289 U. S. 71; *Chesebrough v. Los Angeles County Flood Control District*, 306 U. S. 459.

The existence of the contracts does not call for a different result. The statute in question provided that owners of water rights such as respondent "shall be entitled to receive from the irrigation system an amount of water which is the reasonable equivalent in value of the said water right or concession." The Commissioner of the Interior was authorized "to enter into agreements with such owner or owners as to the amount of water and the time, place and conditions of delivery thereof, which shall be delivered to the lands to which the said water rights or concessions are appurtenant as the fair equivalent in value thereof". Act No. 128, § 13, August 8, 1913, L. 1914, pp. 54-84. The contracts, as well as the statute, speak of "delivery" of the water. But the Supreme Court of Puerto Rico interpreted the contracts as meaning that respondent "agreed to receive [italics supplied] from the irrigation system a certain quantity of water in exchange" for its water rights. I do not think that that construction is unwarranted.

(1) The contracts themselves make plain that as respects cer-

tain intakes on the river, "the presence of water in the river bed in quantities sufficient to permit the taking at the said intakes of the amounts of water specified shall be deemed to be deliveries". That provision alone demonstrates that the Supreme Court of Puerto Rico was justified in interpreting "delivery" in these contracts differently than might be warranted in case of contracts for the cartage of goods. "The word 'deliver' has perhaps as many different shades of meaning ascertained by judicial interpretation as any other term known to the law." *United States v. McCready*, 11 Fed. 225, 234. The problems of operation of an irrigation system are unique in many respects. Manipulation of the gates at the dam determines the flow of water through the various channels. Puerto Rico's undertaking in each instance was to "deliver" water at specified intakes provided by respondent. Those intakes were in the river or in designated reservoirs provided by respondent. It seems reasonable to conclude that Puerto Rico's undertaking was to make the specified quantities of water available so that they would be received at those intakes. To enforce the present tax is not to renig on that undertaking. The fact that respondent was to bear "all extra expenses" in case water was delivered at intakes other than the designated ones seems to me hardly more than a provision that respondent was to bear the cost in case the irrigation system had to be partially relocated to meet its requirements. In any event, it does no more than raise a doubt as to the correct interpretation of the contract—a doubt which, as subsequently pointed out, should not be resolved against the power of Puerto Rico to impose this tax.

(2) It seems to me tolerably clear that such a construction of the contracts comports with the purpose of the arrangement. The contracts state that Puerto Rico "in order to facilitate and make more certain the operation of the said dam and the irrigation system of which it is a part, desires to determine and agree upon an amount of water which, delivered regularly, may, under all attending circumstances, be considered to be fair equivalent in value for irrigation purposes of the amount of water which the Fortuna Estates would under ordinary circumstances take and use under the said water rights and concessions". The amount of water actually obtained by respondent before the dam was erected apparently fell far below the amount to which it was entitled under their water rights. The contracts were designed to sub-

stitute for that latter theoretical figure one which would represent a "fair equivalent in value for irrigation purposes" of the amount of water which respondent would "under ordinary circumstances take and use" under its water rights. From Puerto Rico's point of view such a determination was important so that the demands on the dam could be reduced to known requirements and so that the erection of the dam would not result in a windfall to respondent. The latter certainly would transpire if the dam gave respondent an amount of water which it had not been able to obtain on its own without the irrigation system. Thus the specification in the contracts of the "fair equivalent" of the amount of water which respondent ordinarily would obtain under its water rights was nothing more than a determination of the then worth of the water rights in terms of acre feet of water. Under that view, the contracts did not raise the water rights to a higher constitutional dignity than they previously enjoyed.

(3) No express exemption from this form of taxation is to be found in the contracts. If that exemption exists, it is implied. But even though it be assumed *arguendo* that Puerto Rico's representative had the authority constitutionally to bargain away its taxing power, the exemption should not be inferred. Chief Justice Marshall stated in *Providence Bank v. Billings*, 4 Pet. 514, 561, that a relinquishment of a power to tax "is never to be assumed"; "its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear." If there are doubts, they must be resolved in favor of the government. — *Wells v. Savannah*, 181 U. S. 531; *Chicago Theological Seminary v. Illinois*, 188 U. S. 662; *Metropolitan Street Ry. Co. v. New York*, 199 U. S. 1, 35-36. As stated in *Wells v. Savannah*, *supra*, pp. 539-540, a contract of exemption from taxation must "be clearly proved. It will not be inferred from facts which do not lead irresistibly and necessarily to the existence of the contract. The facts proved must show either a contract expressed in terms, or else it must be implied from facts which leave no room for doubt that such was the intention of the parties and that a valid consideration existed for the contract. If there be any doubt on these matters the contract has not been proven and the exemption does not exist."

That rule should be applied to this situation. It is clear that respondent is one of the beneficiaries of the irrigation system,

even though the additional amount of water which the erection of the dam enabled it to obtain be disregarded. The meaning of the word "delivery" as used in the contracts is at best ambiguous. Hence, we should strictly adhere to the presumption against exemption from taxation. To resolve all ambiguities in the contracts in respondent's favor and against Puerto Rico is to forsake a canon of construction which has long obtained.

In conclusion, Puerto Rico has not treated respondent the same as landowners who have no water rights. The latter have to pay for the construction of the irrigation system as well as for its maintenance and operation. Respondent on the other hand is merely required to contribute towards the cost of maintenance and operation of the system. On these facts that favored treatment is sufficient respect for the integrity of respondent's property rights. To free it from all burden is to give it a windfall. Only under the compulsion of plain and unambiguous language should we permit a beneficiary of such a project to escape his fair share of the costs. There is no such compulsion here. Hence we should refuse to let the contract clause of Puerto Rico's organic law produce an inequitable, unfair, and harsh result.

Mr. Justice BLACK, Mr. Justice MURPHY, and Mr. Justice BYRNES join in this dissent.

